

PUBLIC ANNEX 1



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No.: ICC-01/05-01/13

Date: 29/10/2014

PRE-TRIAL CHAMBER II

**Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine van den Wyngaert**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**In the case of THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO, AIMÉ
KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU AND NARCISSE ARIDO**

Public

**Request of the Defence for Mr. Jean-Pierre Bemba Gombo in ICC-01/05-01/08 for
reclassification of the Transcript of the 26 March 2014 Status Conference**

Source: Defence for Mr. Jean-Pierre Bemba Gombo in ICC-01/05-01/08

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

The Office of the Prosecutor

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A. INTRODUCTION

1. Pursuant to Regulation 23 *bis* (3) of the Regulations of the Court, the Defence for Mr. Jean-Pierre Bemba Gombo in case ICC-01/05-01/08 (“Main Case”) seeks reclassification of the transcript of an *ex parte* Status Conference held on 26 March 2014 (“26 March Transcript”)¹ in the present proceedings, ICC-01/05-01/13 (“Article 70 Case”).

B. BACKGROUND

2. The proceedings in the Main Case against Mr. Bemba, after four years of hearings, are currently entering their final phase. Closing Arguments have been scheduled for the week of 10 November 2014.²

3. In this context, and as foreshadowed in the Closing Brief of Mr. Jean-Pierre Bemba,³ the Defence is in the process of finalising a comprehensive application on the impact of the Article 70 investigations on the fairness of the proceedings in the Main Case. This application focuses, understandably, on the evidential link between the two cases and the prejudice suffered by Mr. Bemba as a result of the Prosecution gaining access to information concerning his witnesses in the Main Case, through its Article 70 investigations.

4. Two of the suspects in the Article 70 Case sought disqualification of the Prosecutor, Deputy Prosecutor, and Prosecution staff on the basis that the simultaneous roles of the Prosecutor in the intertwined Main Case and Article 70

¹ ICC-01/05-01/13-T-5-Conf-EXP-ENG.

² ICC-01/05-01/08-T-363-Conf-ENG-ET, p.35, lines 3-4.

³ ICC-01/05-01/08-3121-Conf.

cases, would lead any reasonable observer to doubt the Prosecutor's impartiality.⁴ The Appeals Chamber rejected this application.⁵

5. Her Honour Judge Ušacka filed a Dissenting Opinion to this Appeals Chamber decision,⁶ in which she makes reference to an *ex parte* Status Conference in the present proceedings, held on 26 March 2014. Notably, Her Honour states:⁷

As regards the evidential link between the two cases, I particularly note that in the *Bemba et al* case, the Defence was not given access to certain crucial documents, including the transcript of an *ex parte* hearing of 26 March 2014, which I consider relevant to the proceedings at hand. It is my firm view that the Appeals Chamber should have reclassified *proprio motu* said transcript to give the Defence access to it.

6. By way of the present application, the Defence in the Main Case seeks access to this 26 March Transcript as part of its overarching duty to preserve Mr. Bemba's right to a fair trial before Trial Chamber III.

C. APPLICABLE LAW

7. Regulation 23 *bis* (3) of the Regulations of the Court provides that:

Where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document. A Chamber may also re-classify a document upon request by any other participant or on its own motion. In the case of an application to vary a protective measure, regulation 42 shall apply.

⁴ ICC-01/05-01/13-250-Conf-tENG.

⁵ ICC-01/05-01/13-648-Red3.

⁶ ICC-01/05-01/13-648-Anx2-Red.

⁷ ICC-01/05-01/13-648-Anx2-Red, para. 10 (internal footnotes omitted).

D. SUBMISSIONS

8. Her Honour Judge Ušacka has made public the existence of an *ex parte* Status Conference, the transcript of which she characterises as “crucial” for the Defence, and which concerns the evidential link between the Main Case and the Article 70 Case. In the Defence submission, the 26 March Transcript is accordingly material to the Defence preparation, in particular in the context of its upcoming filing addressing the prejudice suffered as a result of this evidential overlap as between the two cases.

9. By finding that the Appeals Chamber was in a position to reclassify the 26 March Transcript *proprio motu*, Her Honour has indicated that there is no basis, either in law, or as concerns the security to witnesses, to continue to withhold this material from the Defence.

10. Given that it is now in the public domain that a “crucial” document exists setting out the evidential link between the two cases, the continued non-disclosure of this information to the Defence arguably contributes to the impression of Prosecution partiality and gives rise to further prejudice on the part of Mr. Bemba.

11. Nor is the reclassification in the Article 70 Case a pre-requisite to reclassification in the Main Case. The two proceedings are currently at opposite ends of the procedural spectrum; the Article 70 Case being pre-confirmation, and the Main Case approaching its final stage. The window for being able to remedy improper non-disclosure is greatly reduced in the Main Case. Moreover, should the 26 March Transcript be reclassified in the future and indeed contain information which should rightly have been in the possession of the Defence, the options for remedies are greatly reduced and far more drastic in the Main Case.

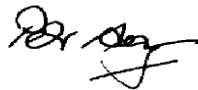
E. REQUESTED RELIEF

12. Given the above, the Defence for Mr. Bemba in the Main Case respectfully requests that the Pre-Trial Chamber:

GRANT the Defence request; and

ORDER the reclassification of transcript ICC-01/05-01/13-T-5-Conf-EXP-ENG, as confidential and available to the Defence of Mr. Jean-Pierre Bemba Gombo in case ICC-01/05-01/08.

The whole respectfully submitted.



Peter Haynes QC

Counsel for Mr. Jean-Pierre Bemba Gombo

The Hague, The Netherlands

29 October 2014