

ANNEX 1

PUBLIC



Original: English

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

Date: 31/10/2014

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 to
lift redactions to 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

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Case ICC-01/05-01/13

Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Paul Djunga Mudimbi

**Counsel for Jean-Jacques Mangenda
Kabongo**

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Göran Sluiter

States' Representatives

Case ICC-01/05-01/08

Counsel for Jean-Pierre Bemba Gombo

Peter Haynes QC

Kate Gibson

Melinda Taylor

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

A. INTRODUCTION

1. The Defence for Mr. Jean-Pierre Bemba Gombo in the Main Case (the Defence) respectfully requests the Pre-Trial Chamber *en banc* to lift any redactions in the Transcript ICC-01/05-01/13-T-5-Conf-EXP-ENG in relation to matters pertaining to the relationship of the Prosecution in the Article 70 case and the Main Case, and the appearance of impartiality of the Prosecution and the Single Judge (the Request).

B. SUBMISSIONS

(i) *Legal basis for the Request*

2. The Request falls within the scope of the Appeals Chamber's direction that Chambers are under a positive obligation to evaluate the continuing necessity for redactions throughout the proceedings.¹ The parties, in turn, possess the corollary right to move the Chamber at any time to reconsider whether the redactions in question are necessary, proportionate, and consistent with the rights of the Defence.

3. The Single Judge resolved the previous request for access to the transcripts by referring to the fact that disclosure would defeat "the purpose of the redactions applied".² The Single Judge did not, however, consider whether the redactions were justified *vis-à-vis* the Defence in the Main Case,³ nor did he consider whether their necessity was outweighed by the prejudicial impact on the rights of the Defence in the Main Case (bearing in mind in particular, the advanced stage of the proceedings in the Main Case).

¹ ICC-01/04-01/07-476, para. 64.

² ICC-01/05-01/13-731, p.4.

³ ICC-01/04-01/07-1915-Red-tENG, para. 8; ICC-01/04-01/06-2521-Red, para. 20.

4. The Single Judge also did not take into consideration the change in circumstances since the date of the Status Conference. In his decision on provisional release, the Single Judge noted that the necessity for the continued detention of the suspects was obviated by the advanced stage reached by these proceedings, the documentary nature of the relevant evidence and the fact that such evidence has by now been acquired in the record, all of which – contrary to what stated by the Prosecutor – also result in reducing the risks that these proceedings or the investigations might be obstructed or endangered, that the alleged crimes be continued or related offences be committed.⁴

5. The same reasoning is applicable to the continued relevance and necessity for the redactions to ICC-01/05-01/13-T-5-Conf-EXP-ENG.

6. Since this particular aspect has not been adjudicated, the Defence has the right to request the Pre-Trial Chamber to consider whether the redaction of the transcript in its entirety is necessary, proportionate, and not unduly prejudicial to the rights of Mr. Bemba in the Main Case.

7. Article 57(2) further provides that “a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided [...] by a majority of the Pre-Trial Chamber”. This article explicitly envisages that the parties can petition the Chamber to adjudicate a particular matter *en banc*.

8. The importance of a full Chamber resolving this issue is underscored by two factors. Firstly, the transcript has been requested for trial and not pre-trial proceedings. As recognised in the Lubanga case, the Statute envisages that trial proceedings should be conducted by a full bench.⁵

⁴ ICC-01/05-01/13-703, p.4.

⁵ ICC-01/04-01/06-1349.

9. Although the Status Conference in question occurred in the Article 70 case, it would appear that matters related to the Main Case were referenced. It is also the position of the Defence that the hearing touched on issues which are of crucial importance to a forthcoming application to Trial Chamber III regarding the overall fairness of the proceedings. In such circumstances, it would be appropriate for an application that might be determinative to a trial related issue to be decided by a full bench.

10. Secondly, according to Judge Ušacka, the transcript is relevant to the appearance of impartiality of the Single Judge in the Article 70 proceedings.⁶ There is thus an objective appearance that the Single Judge might have a personal interest as concerns the continued application of redactions to the transcripts. The principle of open and transparent justice therefore dictates that the Request should be adjudicated by the full Pre-Trial Chamber.

(ii) *Factual basis for the Request*

11. An Appellate Judge has averred that the transcripts reveal an evidential link between the Main Case and the Article 70 case, and that the contents could have been determinative to Defence applications to disqualify both the Single Judge and the Prosecution due to an appearance of a lack of impartiality.⁷

12. The Single Judge has not disputed the relevance of the transcripts, nor the existence of an evidential link.

13. ICC jurisprudence recognises that material that is relevant to an abuse of process application is disclosable under either Article 67(2) or Rule 77.⁸ In line with this jurisprudence and the *ius cogens* nature of the right to an effective remedy, the

⁶ ICC-01/05-01/13-648-Anx2-Red, fn. 6.

⁷ ICC-01/05-01/13-648-Anx2-Red, para. 10.

⁸ ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275; ICC-01/04-01/07-949, fn. 41.

Special Tribunal for Lebanon has recognised the right of defendants to access materials that might be necessary to establish a legal remedy.⁹

14. The Appeals Chamber has also cautioned that the existence of equivalent material does not necessarily satisfy the right of the Defence to access such material.¹⁰ In terms of the balance between the need to preserve redactions and the right of the Defence to access exculpatory material, the Appeals Chamber has emphasised that the terms of Article 67(2) are mandatory: “exculpatory material must be disclosed pursuant to article 67(2) of the Statute”.¹¹

15. Although the Pre-Trial Chamber may order temporary redactions to exculpatory material during the preliminary phases of the proceedings,¹² the defendant’s right to receive exculpatory information must ultimately take precedence.

16. In the present case, the purpose of the Request is to obtain information concerning the evidential link between the two cases, and any information that might create an objective appearance of a lack of impartiality on the part of the Prosecution.

17. The existence of information in the 1 April 2014 filings concerning the correspondence between the Prosecution and the anonymous informant does not satisfy the Request or address the same issues. It therefore does not mitigate the prejudice caused through the complete non-disclosure of the transcript.

⁹ In the matter of El Sayed, ‘Order Assigning the Matter to the Pre-Trial Judge’, CH/PRES/2010/01, <http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/main/filings/orders-and-decisions/president-s-office/f0001-6>; Appeals Chamber, ‘Decision on the Prosecutor’s Partial Appeal of the Pre-Trial Judge’s Order of 20 February 2012’, <http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/main-interlocutory-appeal-04/filings/orders-and-decisions/appeals-chamber/f0007>.

¹⁰ ICC-02/05-03/09-501, para. 40.

¹¹ ICC-01/04-01/07-476, para. 57.

¹² ICC-01/04-01/07-476, para. 57.

18. It is also objectively difficult to ascertain a rationale for redacting an entire transcript, such that it is not possible to ascertain the participants at the hearing or any tenor of the discussions (which might be crucial to an application concerning the impartiality of the Prosecution).

19. In this regard, the Prosecution's interaction with witnesses and informants has become a live issue in the Main Case, as evidenced by the recall of P-169 and the related disclosure of documents concerning expenses to twenty-two witnesses and Prosecution correspondence with them.

20. There are also significant issues, which have yet to be resolved, concerning how persons in the CAR obtained information pertaining to protected Prosecution witnesses. The Registry has recognised that the Prosecution, as the person who called the witnesses, has the right to be apprised of any information collected by the Court in relation to the potential breach of protective measures.

21. Notwithstanding the fact that the anonymous informant purported to have information concerning confidential Defence missions and protected Defence witnesses, the Defence has received absolutely no information as to how this breach in confidentiality occurred, nor has it been given any feedback or assurance that Defence confidentiality as a whole, has not been fundamentally compromised.

22. The Defence has already obtained information that suggests that the Prosecution may have provided different accounts of its interactions with the anonymous information at different times.¹³ The manner in which the Prosecutor has expounded details concerning the anonymous information to the Single Judge are therefore of relevance to the Defence abuse of process application.

¹³ ICC-01/05-01/08-3016-AnxB-Red, pp.16-20.

23. Finally, the Defence notes that the Single Judge basically gave the Prosecutor the keys to the Defence case – including all relevant details concerning protected Defence witnesses, and confidential Defence communications – on the grounds that access to such information would assist the Prosecution’s investigations.

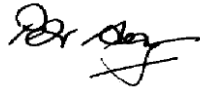
24. The Defence is currently seeking access to a discrete document for a specific purpose. An Appellate Judge has provided concrete grounds to believe that the documentation would assist the Defence. In these circumstances, a refusal to assist the Defence would in itself, create an appearance of partiality, and significant questions regarding the appearance of fairness of the proceedings.

C. RELIEF SOUGHT

25. For the reasons set out above, the Defence respectfully requests the Pre-Trial Chamber to lift any redactions in ICC-01/05-01/13-T-5-Conf-EXP-ENG, which concern:

- a. The evidential link between the Article 70 and Main Case;
- b. The appearance of impartiality of the Prosecution and potential conflicts of interest;
- c. The confidentiality of Defence witnesses and the Defence case;
- d. The consistency of Prosecution submissions on these points; and
- e. Any other matter that might be relevant to the appearance of fairness, impartiality and independence of the proceedings.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes QC

Counsel for Mr. Jean-Pierre Bemba Gombo

The Hague, The Netherlands

31 October 2014