

Confidential Annex

**Cour
Pénale
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**International
Criminal
Court**

Original: English

No: **ICC-01/05-01/08**
Date: **12 November 2015**

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***

Confidential

**First Request for Access to Confidential Material (Questions of the Legal
Representatives of Victims)**

Source: Defence for Jean-Jacques Kabongo Mangenda

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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Mr Peter Haynes QC
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Legal Representatives of the Victims

Unrepresented Victims

Legal Representatives of the Applicants

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

States' Representatives

The Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber VII

Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

I. INTRODUCTION

1. Jean-Jacques Mangenda requests that Trial Chamber III grant him access to the proposed questions submitted by the legal representatives of victims ("LRV") in advance of their oral questioning in *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) ("Main Case"). Access is requested for all such LRV requests through 14 November 2013, including any transmissions thereof by email in parallel with or in lieu of formal filing.
2. This information is necessary and material to the defence in the case of *Prosecutor v. Bemba et al.* (ICC-01/05-01/13) ("Contempt Case"). The Prosecution has alleged in the Contempt Case that Mr. Mangenda performed the *actus reus* of the crimes with which he is charged by forwarding the LRV's written questions in respect of D-15 and D-54 by email to Mr. Kilolo.¹ This argument places in issue the manner in which such questions were normally circulated in the case; when they normally were circulated; to whom they were normally circulated; and the general nature of such questions in relation to proceedings in court. The customary practice is relevant to assessing Mr. Mangenda's state of mind when he allegedly forwarded the LRV questions in respect of D-15 and D-54.
3. The Defence accordingly requests access to: (i) all LRV proposed questions submitted in advance of witness testimony throughout the Main Case; (ii) any decisions, oral rulings or other directions whatsoever describing the modalities by which the proposed questions were to be distributed to the parties; and (iii) any courtesy copies (including lists of email recipients) of such questions that were distributed throughout the Main Case, including the questions pertaining to D-15 and D-54. These materials are relevant to assessing the nature of Mr. Mangenda's alleged act of forwarding these emails, and whether any criminal *mens rea* could be inferred from, or associated with, such an act.

¹ *Bemba et al.*, Transcript, ICC-01/05-01/13-T-10-CONF-ENG, 29 September 2015, pp. 43-45. The present submission is filed confidentially pursuant to Regulation 23*bis* (2) of the Regulations of the Court as it refers to submissions of the same classification. The Defence, however, poses no objection to the reclassification of this submission as public.

II. APPLICABLE LAW

4. Confidential information in one case, according to this Trial Chamber's previous decisions, may be transmitted to a party in another case, and "does not amount to a variance of protective measures as long as the same restrictions are applied *mutatis mutandis* to the recipients thereof."² A party seeking such information must "identify, on the basis of material that is publicly available, the specific documents, or at least sufficiently specific categories of documents, they consider to be necessary for the effective representation of the accused in case ICC-01/05-01/13 and provide a substantiated justification for each document or category."³

III. SUBMISSIONS

5. The Prosecution alleges that Mr. Mangenda contributed to the Common Plan by "preparing and sending to KIOLO documents to be used in falsifying witnesses' testimony."⁴ The Prosecution relies, in particular, on two occasions when Mr. Mangenda allegedly forwarded by email to Mr. Kilolo questions submitted by the LRV for advance authorization to pose oral questions to D-15 and D-54. The Prosecution claims that the re-transmission of these questions by email constitutes the *actus reus* of the crimes with which Mr. Mangenda is charged in the Contempt Case.⁵

² *Bemba*, Decision on "Registry Transmission of a Joint Request received from the Defence teams in the Bemba *et al.* case (ICC-01/05-01/13)", ICC-01/05-01/13-3298, 18 September 2015, para. 19.

³ *Id.* para. 20; *Bemba*, Decision on "Transmission of a submission from Mr Nick Kaufman dated 22 January 2014", ICC-01/05-01/08-2972, 13 February 2014, para. 11.

⁴ *Bemba et al.*, Prosecution Pre-Trial Brief, ICC-01/05-01/13-1110-Conf, 31 July 2015, para. 245 ("(v) providing practical assistance, including preparing and sending to KIOLO documents to be used in falsifying witnesses' testimony and providing KIOLO the use of his phone to facilitate KIOLO's illicit coaching of witnesses"); para. 261 ("(iv) preparing and sending to KIOLO documents to be used in falsifying witnesses' testimony").

⁵ *Bemba et al.*, Transcript, ICC-01/05-01/13-T-10-CONF-ENG, 29 September 2015, p. 43, ll. 11-16 ("[f]or example, on 12 September 2013, at 22.49 hours to be precise, in an intercepted conversation, Kilolo requested Mangenda to send him the confidential list of questions provided by the two legal representatives in the case and Kilolo requested that they be sent immediately before the witness went to bed. Nine minutes later Mr Mangenda sent those lists on to Mr Kilolo and he sent them using his private email"), p. 45, ll. 5-7 ("[a]nd in case you were wondering, the evidence will show that it was Mangenda who emailed those questions to Mr Kilolo in the middle of D-54's testimony on 31 October 2015, just as he had done for D-15"); *Bemba et al.*, Prosecution Pre-Trial Brief, ICC-01/05-01/13-1110-Conf, 31 July 2015, paras. 37, 79, 95 ("[l]ater, at 21:49, KIOLO called MANGENDA, asking him to send the questions that the LRV had provided to the parties confidentially, as required. MANGENDA did so. KIOLO then informed D-15 of the LRV's questions and the answers he expected"); *Bemba et al.*, Warrant of Arrest for Jean-Pierre BEMBA GOMBO, Aimé KIOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO, ICC-01/05-01/13-1-Red2-tENG, 20 November 2013, para. 17 ("[Mr. Mangenda] works very closely with Aimé Kilolo in respect of the coaching of witnesses and the devising of instructions to be issued to them"); *Bemba et al.*, Prosecution Submission on the Confirmation of Charges, ICC-01/05-01/13-597-Conf-AnxB, 30 July 2014, para. 43 ("[a]t least twice (12 September 2013 with D-15 and 30 October 2013 with D-54) KIOLO improperly provided the witnesses the confidential questions of the Legal Representative of Victims"), para. 111 ("[a]t 23:09, KIOLO called MANGENDA, asking him to provide the questions that the Legal Representative of Victims was required to give the parties confidentially. MANGENDA said he would try to do so and did. KIOLO then informed D-

6. The Prosecution has sought, and the Chamber has granted,⁶ disclosure to the Article 70 defence teams of the LRV questions in respect of Witness D-15 and D-54.⁷ The Defence requests disclosure of all prior LRV questions for the other defence witnesses. Such previous applications to pose questions are relevant to Mr. Mangenda's alleged state of knowledge at the time that he allegedly forwarded the LRV's proposed questions in respect of D-15 and D-54.
7. The typical content of such proposed questions, the modalities by which they were shared with the Defence, the timing of such requests and their level of confidentiality are all matters of relevance to the Contempt Case as formulated by the Prosecution. The Defence thus requests, in addition to the questions themselves, any information on the specific aspects of the LRV questions such as the nature, content, timing, the manner used for circulation and whether they were ever circulated by courtesy email. Such information is relevant and necessary to determine whether Mr. Mangenda's act of forwarding emails to Mr. Kilolo could be interpreted or inferred as having been done in furtherance of any illicit act.
8. Granting Mr. Mangenda access to these materials will have no negative impact on the security of any witness. Mr. Mangenda, as former Case Manager for the Defence in the Main Case, already has knowledge of the information whose formal disclosure he now requests. Granting him access to confidential material is, as the Prosecution itself has argued, little more than "an academic exercise"⁸ – but one that will undoubtedly permit the Defence of Mr. Mangenda to effectively analyse and present the

15 of the Legal Representative of Victims' questions and the answers he expected").

⁶ *Bemba*, Decision on "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", ICC-01/05-01/08-3074, 27 May 2014, paras. 3, 23, ordering disclosure of the 'Items', which included *inter alia* two confidential filings of the legal representatives of victims containing lines of questioning for Witness D04-15. The LRV questions concerning D-54 were disclosed to the Article 70 defence teams on 19 June 2015 (CAR-OTP-0088-1630).

⁷ *Bemba*, Requête du Représentant légale de victims relative à l'interrogatoire du témoin 15, ICC-01/05-01/08-2720-Conf, 27 June 2013; *Bemba*, Requête du Représentant légal de victims afin d'être autorisé à interroger le témoin D-015, ICC-01/05-01/08-2725-Conf, 4 July 2013; *Bemba*, Requête du Représentant légal de victims afin d'être autorisé à interroger le témoin 54, ICC-01/05-01/08-2819-Conf, 20 September 2013.

⁸ *Bemba*, Prosecution Request for Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, ICC-01/05-01/08-2951, 30 January 2014, para. 12 ("[a]s the Chamber is aware, Jean-Pierre Bemba Gombo and two members of his Defence team in the *Bemba* Case comprise three of the five suspects in the Article 70 Case. They, like the Prosecution, are already fully privy to the requested transcripts of evidence. As to them, the requested access is very nearly an academic exercise. However, the requested variance is concretely necessary to ensure that all the Defence teams in the Article 70 Case have sufficient access to the transcripts of relevant evidence in the Bemba Case in order to prepare adequately for the confirmation hearing and later for trial.")

information in the Contempt Case.

IV. CONCLUSION AND RELIEF REQUESTED

9. The Defence requests that it be granted access to (i) all LRV proposed questions submitted in advance of witness testimony throughout the Main Case up to and including those pertaining to D-15 and D-54; (ii) any decisions, oral rulings or other directions whatsoever describing the modalities by which the proposed questions were to be distributed to the parties; and (iii) any courtesy copies or email transmissions (including lists of email recipients) of such questions that were distributed throughout the Main Case.



Christopher Gosnell
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Respectfully submitted this 12 November 2015,
At The Hague, The Netherlands