

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 22 May 2014

**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**

**Decision on the "Defence Motion on Prosecution contact with its witnesses"**

**Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:**

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr Jean-Jacques Badibanga

**Counsel for the Defence**

Mr Peter Haynes  
Ms Kate Gibson  
Ms Melinda Taylor

**Legal Representatives of the Victims**

Ms Marie Edith Douzima-Lawson

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the Defence**

Mr Xavier-Jean Keïta

**States Representatives**

**Amicus Curiae**

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**Registrar**

Mr Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Trial Chamber III ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") issues the following Decision on the "Defence Motion on Prosecution contact with its witnesses" ("Decision").

## I. Background and Submissions

1. On 20 March 2013, the Office of the Prosecutor ("prosecution") filed its confidential *ex parte* "Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence" ("Article 70 Notice"),<sup>1</sup> in which it, *inter alia*, requested the Chamber to vary the terms of the procedure established by the Chamber for contacts between a party or participants and the witnesses to be called by the other party or participants ("Decisions 813 and 2293").<sup>2</sup> The prosecution requested this variation in order to be allowed to conduct, within the context of its investigations under Article 70 of the Rome Statute ("Statute"), interviews with witnesses called to testify by the Defence of Mr Jean-Pierre Bemba ("defence") in the *Bemba* case without prior notice to the defence.<sup>3</sup>
2. On 26 April 2013, the Chamber issued its "Decision on the prosecution's request relating to Article 70 investigation" ("Decision 2606"),<sup>4</sup> in which, stressing that "a Pre-Trial Chamber is the competent judicial authority to make

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<sup>1</sup> Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence, 20 March 2013, ICC-01/05-01/08-2548-Conf-Exp, a confidential redacted version of this submission was filed on 31 January 2014: ICC-01/05-01/08-2548-Conf-Red. The Chamber notes that the present Decision refers to the content of an *ex parte* filing; in the view of the Chamber, this information does not require *ex parte* treatment at this time.

<sup>2</sup> Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 June 2010, ICC-01/05-01/08-813-Conf-Exp, this decision was classified as confidential on 20 July 2010, ICC-01/05-01/08-813-Conf, a public redacted version was filed on the same date, ICC-01/05-01/08-813-Red, paragraphs 66 to 68 and Decision on the "Prosecution Motion on Procedure for Contacting Defence Witnesses and to Compel Disclosure", 4 September 2012, ICC-01/05-01/08-2293-Conf, reclassified as public on 15 October 2012 ICC-01/05-01/08-2293.

<sup>3</sup> ICC-01/05-01/08-2548-Conf-Exp, paragraph 38 (e).

<sup>4</sup> Decision on the prosecution's request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Conf-Exp, this decision was reclassified as confidential on 9 December 2013, ICC-01/05-01/08-2606-Conf and a public redacted version was filed on 2 May 2014, ICC-01/05-01/08-2606-Red.

determinations on any investigative measures requested by the prosecution in relation to an Article 70 investigation”,<sup>5</sup> it decided that it had no competence to address the prosecution’s request.<sup>6</sup> Subsequently, proceedings related to alleged offences under Article 70 of the Statute (“Article 70 Investigation”) were initiated by the prosecution before Pre-Trial Chamber II, i.e. case *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (“ICC-01/05-01/13”).<sup>7</sup>

3. On 12 February 2014, the defence filed its “Defence Motion on Prosecution contact with its witnesses” (“Defence Motion”),<sup>8</sup> in which it noted that the Single Judge of Pre-Trial Chamber II had authorised the prosecution to contact and interview witnesses previously called by the defence in the *Bemba* case, for the purposes of the Article 70 Investigation, without prior notice to the defence.<sup>9</sup> The defence requests that the Chamber order the prosecution (i) to refrain from contacting any witnesses called by the defence outside the procedure established by the Chamber (“First Request”); and, (ii) if such contact has occurred, to immediately disclose all interview notes, statements, or transcripts of interviews generated during the course of this contact (“Second Request”).<sup>10</sup>
4. The defence submits that, in accordance with the procedure established by the Chamber, the prosecution was not entitled to contact “defence witnesses” directly and that the defence was entitled to be present or attend any interviews to which the witnesses consented.<sup>11</sup> The defence further argues that the prosecution “must disclose any and all statements of Defence witnesses in its possession” as these statements are “properly disclosable under Rule 77 [of the

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<sup>5</sup> ICC-01/05-01/08-2606-Red, paragraph 21.

<sup>6</sup> ICC-01/05-01/08-2606-Red, paragraph 22.

<sup>7</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13.

<sup>8</sup> Defence Motion on Prosecution contact with its witnesses, 12 February 2014, ICC-01/05-01/08-2971-Conf. A public redacted version of this decision was filed on the same day: ICC-01/05-01/08-2971-Red.

<sup>9</sup> ICC-01/05-01/08-2971-Red, paragraph 5.

<sup>10</sup> ICC-01/05-01/08-2971-Red, paragraph 17.

<sup>11</sup> ICC-01/05-01/08-2971-Red, paragraph 3.

Rules]”, a position the defence asserts is supported by the jurisprudence of Trial Chamber I and other international criminal tribunals.<sup>12</sup> The defence argues that, since this material is “undoubtedly disclosable under Rule 77 [of the Rules]”, and it has received no disclosure of such material to date, it “must assume that no such contact has taken place”.<sup>13</sup>

5. This notwithstanding, the defence submits, “the Single Judge has effectively quashed a standing order from this Trial Chamber, and has done so without being privy to the information which was before the Trial Chamber when it devised the Protocol”.<sup>14</sup> According to the defence, after reviewing the assessments and recommendations of the Victims and Witnesses Unit as regards vulnerability and need for protective measures, the Chamber instructed “that in all the circumstances of the case, a party was not permitted to contact another party’s witnesses directly”.<sup>15</sup> The defence claims that the “variation” or “exception” created by the Single Judge had “[n]o legal or statutory basis” and allowed the prosecution’s desire to investigate in an attempt to build a case under Article 70 of the Statute, to trump “orders and safeguards put in place by a Trial Chamber [...] as concerns the safety and dignity of witnesses”.<sup>16</sup>
6. The defence submits that telephone calls from the prosecution “investigating” whether witnesses lied in their testimony is “likely to cause confusion and fear on the part of many of the witnesses who had understood that their association with the Court was over”.<sup>17</sup> Lastly, the defence avers that no “sensible distinction [can] be drawn on the basis that the Defence witnesses have now concluded their testimony” and that “to suggest that such interviews are or can

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<sup>12</sup> ICC-01/05-01/08-2971-Red, paragraphs 9 and 10.

<sup>13</sup> ICC-01/05-01/08-2971-Red, paragraph 11.

<sup>14</sup> ICC-01/05-01/08-2971-Red, paragraph 13.

<sup>15</sup> ICC-01/05-01/08-2971-Red, paragraph 13.

<sup>16</sup> ICC-01/05-01/08-2971-Red, paragraph 14.

<sup>17</sup> ICC-01/05-01/08-2971-Conf, paragraph 15.

be limited to the purpose of the Article 70 investigation is to make a wholly false distinction".<sup>18</sup>

7. On 20 February 2014, the prosecution filed its "Prosecution's Response to 'Defence Motion on Prosecution contact with its witnesses'" ("Prosecution Response"),<sup>19</sup> in which it requests the Chamber to reject the Defence Motion,<sup>20</sup> arguing that, if granted, it "will impede the Prosecution's ability to further investigate crimes against the administration of justice under Article 70 of the [Statute] in accordance with its statutory duty".<sup>21</sup>
8. The prosecution argues that its obligations and responsibilities are distinct from those of the defence and include the "duty to take the necessary measures to protect any persons, including defence witnesses in the course of its investigations and prosecutions".<sup>22</sup> The prosecution submits that the defence fails to demonstrate how the mere pursuit of an investigation by the prosecution, in accordance with its statutory obligations, would result in destabilisation, confusion or fear on the part of the witnesses.<sup>23</sup>
9. Further, the prosecution stresses that the decisions of the Chamber and other jurisprudence referred to by the defence regulate "prior contact between a party or a participant and the *witnesses to be called* by the other party or participant" and were focused on ensuring "efficient trial presentation and the effective examination of the truthfulness of trial testimony".<sup>24</sup> However, the prosecution

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<sup>18</sup> ICC-01/05-01/08-2971-Red, paragraph 16.

<sup>19</sup> Prosecution's Response to "Defence Motion on Prosecution contact with its witnesses", 20 February 2014, ICC-01/05-01/08-2990-Conf. A public redacted version of this response was filed on 6 March 2014: ICC-01/05-01/08-2990-Red.

<sup>20</sup> ICC-01/05-01/08-2990-Red, paragraph 19.

<sup>21</sup> ICC-01/05-01/08-2990-Red, paragraph 2 (parenthesis omitted).

<sup>22</sup> ICC-01/05-01/08-2990-Red, paragraph 11.

<sup>23</sup> ICC-01/05-01/08-2990-Red, paragraph 11.

<sup>24</sup> ICC-01/05-01/08-2990-Red, paragraph 12.

submits that any contact with witnesses called by the defence in the *Bemba* case was conducted “*post-testimony*” and limited to the Article 70 Investigation.<sup>25</sup>

10. As to the issue of disclosure, the prosecution submits that the material obtained in the Article 70 Investigation has not been provided to the Chamber for the determination of the charges in the *Bemba* case and asserts that disclosure is “intrinsicly linked to the Chamber’s decision on the relevance of any such evidence for the current trial proceedings”.<sup>26</sup> However, the prosecution submits, it “stands ready to disclose this material, should the Chamber decide otherwise”.<sup>27</sup>

11. On 3 March 2014, with leave of the Chamber,<sup>28</sup> the defence filed its “Defence Reply to the ‘Prosecution’s Response to ‘Defence Motion on Prosecution contact with its witnesses’” (“Defence Reply”).<sup>29</sup> The defence submits that the prosecution’s argument is “illogical” as it “tries to equate *inter partes* disclosure with the admission of evidence”,<sup>30</sup> and that the prosecution’s position that the disclosure of material collected in the Article 70 Investigation is intrinsicly linked to the Chamber’s decision as to their relevance for the current proceedings “is similarly erroneous”.<sup>31</sup> The defence submits that the prosecution’s disclosure obligations are “fixed” and that, although the defence has not seen the statements “it is absolutely inconceivable that these statements do not concern the veracity of the testimony given in the present proceedings. They are disclosable to the Defence, independent of the admissibility as evidence of other material produced as a result of the Article 70

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<sup>25</sup> ICC-01/05-01/08-2990-Red, paragraph 17.

<sup>26</sup> ICC-01/05-01/08-2990-Red, paragraph 18.

<sup>27</sup> ICC-01/05-01/08-2990-Red, paragraph 18.

<sup>28</sup> See Decision on “Defence Request for Leave to Reply to the ‘Prosecution’s Response to ‘Defence Motion on Prosecution contact with its witnesses’”, 26 February 2014, ICC-01/05-01/08-2995.

<sup>29</sup> Defence Reply to the ‘Prosecution’s Response to “Defence Motion on Prosecution contact with its witnesses”, 3 March 2014, ICC-01/05-01/08-3000-Conf.

<sup>30</sup> ICC-01/05-01/08-3000-Conf, paragraph 8.

<sup>31</sup> ICC-01/05-01/08-3000-Conf, paragraph 11.

investigations.”<sup>32</sup> In addition, the defence request that the Chamber order that some paragraphs of the Prosecution Response, which the defence alleges are arguments on factual matters with no evidentiary foundation in the *Bemba* case, be struck from the record of the case and form no part of the Chamber’s deliberations (“Third Request”).<sup>33</sup>

## II. Analysis and Conclusions

12. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute, the Chamber has considered Articles 54, 57, 64(2) and (6)(c), 67(1)(b) and (2) and 68(1) of the Statute, and Rules 77, 81 and 82 of the Rules of Procedure and Evidence.

### *First Request*

13. In its First Request, the defence asks the Chamber to order the prosecution to refrain from contacting witnesses called by the defence outside the procedure established by the Chamber.<sup>34</sup> Therefore, the first matter for the Chamber to address is whether interviews conducted with witnesses called by the defence in the *Bemba* case, in the context of the Article 70 Investigation, may have or would actually infringe the Chamber’s Decisions 813 and 2293.

14. The Chamber recalls that in its Decisions 813 and 2293 it ruled on the “*prior* contact between a party or a participant and the witnesses *to be called* by the other party or a participant”.<sup>35</sup> The Chamber endorsed Trial Chamber I’s view that such meetings, with “a witness whom the other party or participant *intends to call*”,<sup>36</sup> “may assist the efficient management of the proceedings” and enable

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<sup>32</sup> ICC-01/05-01/08-3000-Conf, paragraph 11.

<sup>33</sup> ICC-01/05-01/08-3000-Conf, paragraphs 12 to 14.

<sup>34</sup> ICC-01/05-01/08-2971-Conf, paragraph 17.

<sup>35</sup> ICC-01/05-01/08-2293, paragraph 7 [emphasis added].

<sup>36</sup> ICC-01/05-01/08-813-Red, paragraph 66 [emphasis added].



“timely investigation *prior* to the witness giving evidence”.<sup>37</sup> The Chamber added that the meetings could also be of particular benefit where, as was the case with the witnesses called by the defence in the *Bemba* case, “the disclosed summaries of the issues on which witnesses called by the other party *will* testify provide insufficient detail for the interviewing party to effectively and efficiently carry out an investigation”.<sup>38</sup> As is evident from the above, the procedure set out by the Chamber in its Decisions 813 and 2293 was created to regulate meetings held *prior* to the testimony of the witnesses.

15. In light of the prosecution’s assertion that no contact was made with witnesses in the *Bemba* case in the context of the Article 70 Investigation *prior to or during* their testimony and that “any such contact would [...] only be *post-testimony*”,<sup>39</sup> the Chamber does not consider the defence to have demonstrated any breach of the Chamber’s procedure set out in Decisions 813 and 2293.

16. Notwithstanding the above, the Chamber notes that, in accordance with the Protocol of Witnesses Familiarisation (“Protocol”), the prohibition of contact between a witness and the party introducing him or her – such contact is barred as from the commencement of the process of witness familiarisation – is lifted when the witness’s evidence is completed.<sup>40</sup> However, the Protocol is silent as to the possible *post-testimony* contact between a party or participant and the witnesses called by the other party or participant. Nonetheless, the Chamber notes that in accordance with the Protocol, once a witness has completed his or her testimony, the Victims and Witnesses Unit (“VWU”) is under the obligation to address any security concerns the witnesses may have, including after their safe return to their place of residence.<sup>41</sup> Further, as a general rule in the *Bemba*

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<sup>37</sup> ICC-01/05-01/08-2293, paragraph 8 [emphasis added].

<sup>38</sup> ICC-01/05-01/08-2293, paragraph 9 [emphasis added].

<sup>39</sup> ICC-01/05-01/08-2990-Red, paragraph 17.

<sup>40</sup> See Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 8 December 2000, ICC-01/05-01/08-1081-Anx, paragraph 104.

<sup>41</sup> ICC-01/05-01/08-1081-Anx, paragraphs 107 to 113.

case and considering the particular security situation in the places of residence of the witnesses, the addresses and contact details of witnesses is information that the Chamber has consistently considered to fall under Article 68(1) of the Statute and, as such, has not been disclosed to the parties or participants.<sup>42</sup> Consequently, although not regulated in the Protocol or in the Chamber's Decisions 813 and 2293, for a party or participant in the *Bemba* case to be allowed to contact the witnesses called by the other party or participant after the conclusion of their testimony, they should obtain authorisation by the competent judicial authority and act in coordination with the VWU.

17. In the case at hand, the Chamber notes that the prosecution initially requested the Chamber's authorisation to conduct interviews with the witnesses called by the defence.<sup>43</sup> However, the Chamber considered that the competent judicial authority to deal with such a request was a Pre-Trial Chamber and not Trial Chamber III.<sup>44</sup> Further, as the defence notes, the Single Judge of Pre-Trial Chamber II, specifically authorised the prosecution to contact witnesses called by the defence in the *Bemba* case, after "having found good reasons supporting the Prosecutor's requests", and instructing the VWU to provide the prosecution with the contact details of the witnesses and with the necessary and appropriate assistance to facilitate such contact.<sup>45</sup> In addition, in relation to the defence's concern for the "confusion and fear" that calls from the prosecution may have caused to the witnesses, the Chamber notes that, in accordance with Articles 54(1)(b) and 68(1) of the Statute, the prosecution has the duty to take measures

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<sup>42</sup> See, *inter alia*, ICC-01/05-01/08-813-Conf, paragraphs 65 and 66; Decision on defence disclosure and related issues, 24 February 2012, ICC-01/05-01/08-2141, paragraphs 23 and 29; Confidential redacted version of "Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [REDACTED]' (ICC-01/05-01/08-2827-Conf-Exp)" of 25 October 2013, 5 November 2013, ICC-01/05-01/08-2845-Conf-Red, paragraph 12; Decision on "Defence Motion for Reclassification of documents", 1 May 2014, ICC-01/05-01/08-3057, paragraph 17.

<sup>43</sup> ICC-01/05-01/08-2548-Conf-Exp, paragraph 38.

<sup>44</sup> ICC-01/05-01/08-2606-Red, paragraphs 21 and 22.

<sup>45</sup> ICC-01/05-01/08-2971-Red, paragraph 5(c), referring to Decision on the "Registry's Observations pursuant to regulation 24 *bis* of the Regulations of the Court on the implementation of the 'Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70''", 27 May 2013, ICC-01/05-50, paragraphs 11 and Decision on the Prosecutor's 'Third request for judicial order to obtain evidence for investigation under Article 70' dated 7 October 2013 (ICC-01/05-60-Conf-Exp), 10 October 2013, ICC-01/05-62-Red, page 5.

to respect the interests and personal circumstances and protect the safety, physical and psychological well-being of victims and witnesses.

18. In view of the above, taking into account that the presentation of oral evidence in the *Bemba* case has now concluded,<sup>46</sup> the procedure devised in Decisions 813 and 2293 is not applicable in the present circumstances. Therefore, the Chamber finds that the defence's First Request – to order the prosecution to refrain from contacting witnesses called by the defence outside the procedure established by the Chamber in its Decision 2293 – at this stage of the proceedings cannot be ruled upon and is therefore dismissed.

### *Second Request*

19. In its second request the defence asks the Chamber to order the prosecution to immediately disclose all interview notes, statements, or transcripts of interviews ("Items") generated during the course of any contact between the prosecution and the witnesses called by the defence in the *Bemba* case.<sup>47</sup>
20. The Chamber reiterates its consistent approach that responsibility for ensuring that the prosecution satisfies its disclosure obligations rests with the prosecution itself pursuant to Article 67(2) of the Statute and Rule 77 of the Rules.<sup>48</sup> The Chamber's role is limited to resolving disputes when there are grounds for suggesting that the prosecution has failed to discharge its ongoing disclosure

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<sup>46</sup> The final deadline for the presentation of oral evidence by the defence expired on 15 November 2013, *see* Public redacted version of "Corrigendum to Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'", 19 November 2013, ICC-01/05-01/08-2899-Corr-Red.

<sup>47</sup> ICC-01/05-01/08-2971-Red, paragraph 17.

<sup>48</sup> *See, inter alia*, Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-Conf, paragraphs 30 and 37; Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paragraphs 215 and 216; and Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 12 July 2011, ICC-01/05-01/08-1594-Red.

obligations.<sup>49</sup> The Chamber notes that, although the prosecution declares that it is “ready to disclose this material”,<sup>50</sup> there is disagreement between the parties as to whether the prosecution is under an obligation, at this stage, to disclose the Items to the defence in the *Bemba* case.

21. The defence submits that the Items are “undoubtedly disclosable under Rule 77”.<sup>51</sup> The prosecution, however, alleges that it has discharged its ongoing obligation to disclose Rule 77 information throughout the course of the proceedings, but that “disclosure of any witness related Article 70 material is intrinsically linked to the Chamber’s decision on the relevance of any such evidence for the current trial proceedings”.<sup>52</sup>

22. The Chamber notes that, under Rule 77 of the Rules, subject to the restrictions on disclosure as provided for in the Statute and the Rules, the prosecution “shall” permit the defence to inspect any books, documents, photographs and other tangible objects in its possession or control that (i) are material to the preparation of the defence; (ii) are intended for use by the prosecution as evidence for the purposes of the confirmation hearing or at trial; or (iii) were obtained from or belonged to the person. In the case at hand, the material did not come from the accused and the prosecution has not submitted it as evidence in the trial. The question before the Chamber, therefore, is whether the Items gathered as a result of any interviews between the prosecution and witnesses called by the defence in the *Bemba* case are “material to the preparation of the defence”.

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<sup>49</sup> See, *inter alia*, Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-Conf, paragraphs 30 and 37; Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paragraphs 215 and 216; and Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 12 July 2011, ICC-01/05-01/08-1594-Red.

<sup>50</sup> ICC-01/05-01/08-2990-Conf, paragraph 18.

<sup>51</sup> ICC-01/05-01/08-2971-Conf, paragraph 11.

<sup>52</sup> ICC-01/05-01/08-2990-Conf, paragraphs 17 and 18.

23. As the Chamber has previously held,<sup>53</sup> in line with the consistent jurisprudence of the Court,<sup>54</sup> “the prosecution’s disclosure obligations under Rule 77’s materiality prong are broad. Those obligations are not, however, unlimited.”<sup>55</sup> An item will be considered material to the preparation of the defence if it would “undermine the prosecution case or support a line of argument of the defence” or “significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case”.<sup>56</sup> The Chamber considers that items do not necessarily need to be “directly linked to exonerating or incriminating evidence”,<sup>57</sup> nor have been admitted as evidence in the case, in order to be considered “material to the preparation of the defence”. Further, although in a different context, the Chamber has previously ordered the prosecution to disclosure to the defence some items related to a witness even *after* the completion of his oral testimony,<sup>58</sup> as they were found to be material to the preparation of the defence within the terms of Rule 77 of the Rules.

24. In the case at hand, the Chamber finds that the Items are material to the preparation of the defence as they may allow the defence to assess witnesses’ evidence and credibility.<sup>59</sup> Having said this, the Chamber is guided by the Appeals Chamber’s approach to Rule 77 of the Rules and finds that, since the Chamber considers this material to be material to the preparation of the defence, the prosecution should allow defence to inspect such materials, bearing

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<sup>53</sup> See ICC-01/05-01/08-750-Conf; ICC-01/05-01/08-802; and ICC-01/05-01/08-1594-Red.

<sup>54</sup> Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501, paragraph 38; Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paragraph 77; Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, paragraph 16 and Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219, 30 August 2010, ICC-01/04-01/07-2309-Red-tENG.

<sup>55</sup> ICC-01/05-01/08-1594-Red, paragraph 21 (internal citation omitted).

<sup>56</sup> ICC-01/04-01/06-2624, paragraph 16.

<sup>57</sup> ICC-01/04-01/06-1433, paragraph 77.

<sup>58</sup> ICC-01/05-01/08-1594-Conf, paragraph 27.

<sup>59</sup> ICC-01/05-01/08-1594-Conf, paragraphs 26 and 27.

in mind any consideration as to whether restrictions on disclosure should be imposed pursuant to the Statute and Rules 81 and 82 of the Rules.<sup>60</sup>

25. As to possible restrictions, the Chamber notes that the defence requests inspection of “all interview notes, statements, or transcripts of interviews” generated during the course of contacts between the prosecution and witnesses called by the defence in the *Bemba* case.<sup>61</sup> The Chamber finds that, in principle, the Items generated during the course of contacts between prosecution and witnesses called by the defence may be material to the preparation of the defence. However, in general terms, “interview notes” fall within the scope of Rule 81(1) of the Rules. However, the Chamber has previously held in relation to screening notes or investigator’s notes that the prosecution’s duties within the scope of Article 67(2) of the Statute and Rule 77 of the Rules require fact-specific decisions for each interview note or pre-interview assessment, and “critically the prosecution must ensure that if there has been a later formal statement all exculpatory material in the screening notes has been disclosed within the statement, along with any information that is material to defence preparation. If this had not occurred, the prosecution must disclose the screening notes, or the relevant information.”<sup>62</sup>

26. In addition, the Chamber notes that the Single Judge of Pre-Trial Chamber II has authorised Mr Bemba to share his access to the entire case file of case ICC-01/05-01/13 with his Counsel in the *Bemba* case.<sup>63</sup> In that decision, the Single Judge was of the view that the assumption that there is a separation between a defendant and his or her counsel “is inaccurate”,<sup>64</sup> and that since “Jean Pierre Bemba has indeed access to all of documents which his Counsel in the Main Case wishes to

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<sup>60</sup> ICC-02/05-03/09-501, paragraph 35.

<sup>61</sup> ICC-01/05-01/08-2971-Conf, paragraph 17.

<sup>62</sup> ICC-01/05-01/08-750-Conf, paragraph 33.

<sup>63</sup> Decision on the “Defence Request for access to confidential transcripts and filings” dated 1 April 2014 submitted by the Defence for Jean-Pierre Bemba Gombo in case ICC-01/05-01/08, 15 April 2014, ICC-01/05-01/13-338.

<sup>64</sup> ICC-01/05-01/13-338, page 3.

access and is therefore entitled to decide whether, and to what extent, he shall or shall not share such access with his Counsel".<sup>65</sup> As such, the requested Items, if any, should already have been subject to disclosure in case ICC-01/05-01/13, and both the accused and his counsel in the present proceedings should have already been given access to them. Therefore, any restriction to disclosure that may have been authorized by the Single Judge will not be affected by the present Decision.

27. In light of the foregoing, the Chamber partially grants the defence's Second Request and instructs the prosecution to permit the defence to inspect the Items, subject to the restrictions on disclosure provided for in the Statute and Rules 81 and 82 of the Rules, which should be assessed by the prosecution on a case-by-case basis, or to any restrictions ordered by the Single Judge of Pre-Trial Chamber II.

### *Third Request*

28. In its Reply the defence additionally requests the Chamber to order that certain paragraphs of the Prosecution Response, which the defence alleges are arguments on factual matters with no evidentiary foundation in the *Bemba* case, be struck from the record of the case and form no part of the Chamber's deliberations.<sup>66</sup>

29. The Chamber is of the view that, although the parties and participants should refrain from making unsubstantiated allegations, the defence's request is unwarranted.<sup>67</sup> The Chamber notes that it is composed of professional judges who, unlike a lay jury, will be sufficiently capable of evaluating the value of any

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<sup>65</sup> ICC-01/05-01/13-338, page 4.

<sup>66</sup> ICC-01/05-01/08-3000-Conf, paragraphs 12 to 14.

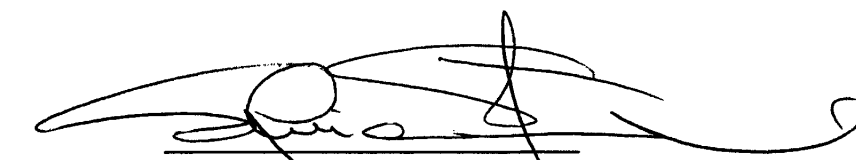
<sup>67</sup> For a similar approach see Decision on "Defence Request for Withdrawal or Clarification of a Filing", 11 March 2014, ICC-01/05-01/08-3011.

allegations brought before it and to disregard them as necessary, without the need for unfounded allegations to be struck from the record of the case.

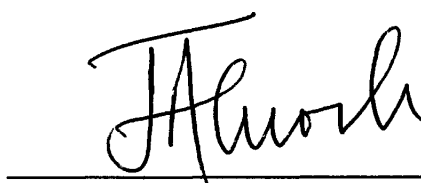
30. For the above reasons the Chamber:

- (i) DISMISSES the defence's First Request;
- (ii) PARTIALLY GRANTS the defence's Second Request and instructs the prosecution to permit the defence to inspect all relevant material falling within the scope of Article 67(2) of the Statute and Rule 77 of the Rules, subject to the restrictions on disclosure provided for in the Statute and Rules 81 and 82 of the Rules; and
- (iii) REJECTS the defence's Third Request.

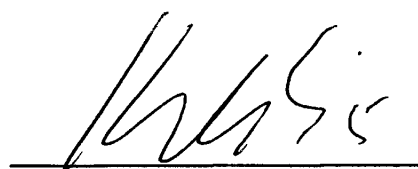
Done in both English and French, the English version being authoritative.



**Judge Sylvia Steiner**



**Judge Joyce Aluoch**



**Judge Kuniko Ozaki**

Dated this 22 May 2014

At The Hague, the Netherlands