

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 June 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***

Public

**Redacted Version of "Decision on 'Prosecution's Second Further Request for
Disclosure of Evidence in a Related Article 70 Proceeding'"**

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

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Ms Natacha Schauder

Detention Section

**Victims Participation and Reparations
Section**

**Other
Pre-Trial Chamber II**

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 “Prosecution’s Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding” (“Decision”).

I. Background and Submissions

1. On 27 May 2014, the Chamber issued its “Decision on ‘Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding’” (“Decision 3074”)¹ in which it decided on a request (“First Prosecution Request”)² by the Office of the Prosecutor (“prosecution”) for the disclosure of a specific number of unredacted transcripts and filings from the *Bemba* case to the defence in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (“case ICC-01/05-01/13”).
2. In Decision 3074, the Chamber held that, pursuant to Rule 87(3) of the Rules, materials from the *Bemba* case could be shared with a chamber, parties, and participants in different proceedings before the Court, so long as the protective measures ordered by the Chamber remained unchanged and the materials protected by such measures were not released to the public, press, and information agencies.³ The Chamber therefore

¹ Decision on “Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding”, 27 May 2014, ICC-01/05-01/08-3074-Conf. In so far as this Decision refers to other confidential filings, the Chamber finds that the limited reference to these documents does not require confidential treatment at this time.

² Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding, 22 April 2014, ICC-01/05-01/08-3052-Conf. A public redacted version of Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding was filed and notified on 3 June 2014, ICC-01/05-01/08-3052-Red.

³ ICC-01/05-01/08-3074-Conf, paragraph 17.

authorised the prosecution to disclose the requested materials, provided that all protective measures ordered in relation to the witnesses concerned continued to have full force and effect until otherwise decided by the Chamber.⁴

3. On 10 June 2014, the prosecution filed its "Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding" ("Second Prosecution Request")⁵, in which it requests the Chamber to authorise disclosure of unredacted trial transcripts of Witnesses D04-06⁶ and D04-13⁷ to the defence in case ICC-01/05-01/13.
4. The prosecution submits that a report ("Independent Counsel Report"), made by an independent counsel appointed by Pre-Trial Chamber II, revealed evidence implicating the aforementioned witnesses "involvement in the alleged corrupt influencing of witnesses".⁸ The prosecution argues that disclosure of the requested unredacted transcripts is crucial to proving charges that it will include in the Document Containing the Charges ("DCC"), "particularly as the information implicating these witnesses is not contained in other evidence in the possession of, or otherwise available to, the prosecution".⁹

⁴ ICC-01/05-01/08-3074-Conf, paragraph 20.

⁵ Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding, 10 June 2014, ICC-01/05-01/08-3086-Conf. A public redacted version of the Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding was filed and notified on 11 June 2014, ICC-01/05-01/08-3086-Red.

⁶ Referring to transcripts ICC-01/05-01/08-T-328-CONF-ENG ET, 21 June 2013; ICC-01/05-01/08-T-328bis-CONF-ENG ET, 21 June 2013; ICC-01/05-01/08-T-329-CONF-ENG ET, 24 June 2013; and ICC-01/05-01/08-T-329bis-CONF-ENG ET, 24 June 2013.

⁷ Referring to transcripts ICC-01/05-01/08-T-350-CONF-ENG ET, 12 November 2013; ICC-01/05-01/08-T-351-CONF-ENG ET, 13 November 2013; and ICC-01/05-01/08-T-352-CONF-ENG ET, 14 November 2013.

⁸ ICC-01/05-01/08-3086-Red, paragraph 5.

⁹ ICC-01/05-01/08-3086-Red, paragraph 6.

5. The prosecution incorporates its submission in the First Prosecution Request by reference.¹⁰ In that request, the prosecution submitted that: (i) Regulation 42(2) should serve as a legal basis for the prosecution's disclosure request, and that such disclosure would not amount to a variation of protective measures under Regulation 42(3) of the Regulations of the Court ("Regulations"),¹¹ (ii) should it consider that Regulation 42(3) applies, the Chamber should nevertheless authorise the requested disclosure,¹² and (iii) the Victims and Witnesses Unit ("VWU") confirmed that disclosure of the unredacted transcripts to the suspects in case ICC-01/05-01/13 would not negatively impact the security of witnesses.¹³
6. In addition, the prosecution argues that disclosure of the requested transcripts would not cause prejudice to the defence, and would be "manifestly in the interests of justice, particularly to preserve the integrity of proceedings before the Court".¹⁴
7. Lastly, the prosecution submits that were the Chamber to grant the Second Prosecution Request, the prosecution would inform the defence in case ICC-01/05-01/13 of the nature of protective measures granted to the two witnesses in question and the confidentiality level of the transcripts, in accordance with Decision 3074 and Regulation 42(2) of the Regulations.¹⁵

¹⁰ ICC-01/05-01/08-3086-Red, paragraph 8.

¹¹ See ICC-01/05-01/08-3052-Red, paragraphs 7 to 12.

¹² See ICC-01/05-01/08-3052-Red, paragraphs 13 to 18.

¹³ See ICC-01/05-01/08-3052-Red, paragraph 21.

¹⁴ ICC-01/05-01/08-3086-Red, paragraph 9.

¹⁵ ICC-01/05-01/08-3086-Red, paragraph 10.

8. On 18 June 2014, the defence filed its "Defence Response to Request to Vary Protective Measures" ("Defence Response"),¹⁶ in which it asks that the Chamber reject the Second Prosecution Request.¹⁷ The defence submits that the Second Prosecution Request is "framed in unnecessarily prejudicial terms" and that its underlying objective is moot and "causes disproportionate risk" to Witnesses D04-06 and D04-13.¹⁸
9. The defence argues that Pre-Trial Chamber II granted an extension of time limit for the submission of the prosecution's DCC solely in order to enable the prosecution to obtain and peruse the Independent Counsel Report and not to rely on any further evidence.¹⁹ The defence suggests that since the prosecution has not obtained authorisation to rely on other evidence filed after the initial deadline for finalisation of the DCC, it "would be disproportionately prejudicial to expose Witnesses D[04-0]6 and D[04]-13 to further risk" through the disclosure of their unredacted transcripts.²⁰
10. The defence submits that Witnesses D04-06 and D04-13 are no longer recipients of security assistance by the VWU due to the closure of the *Bemba* case, meaning that the protective measures which they benefitted from in the *Bemba* case will no longer have "full force and effect".²¹ The defence argues that disclosure of the requested transcripts in proceedings

¹⁶ Defence Response to Request to Vary Protective Measures, 18 June 2014, ICC-01/05-01/08-3094-Conf. A public redacted version of the Defence Response to Request to Vary Protective Measures was filed and notified the same day, ICC-01/05-01/08-3094-Red.

¹⁷ ICC-01/05-01/08-3094-Red, paragraph 21.

¹⁸ ICC-01/05-01/08-3094-Red, paragraph 11.

¹⁹ ICC-01/05-01/08-3094-Red, paragraphs 4 to 6, referring to the Decision on the "Prosecution's request for variation of time limits pursuant to regulation 35 of the Regulations of the Court concerning the confirmation of charges" dated 3 March 2014, 14 March 2014, ICC-01/05-01/13-255 and the Decision amending the calendar for the confirmation of the charges, 28 May 2014, ICC-01/05-01/13-443.

²⁰ ICC-01/05-01/08-3094-Red, paragraph 7.

²¹ ICC-01/05-01/08-3094-Red, paragraphs 8 and 9.

in which Witnesses D04-06 and D04-13 are not the recipients of protective measures would constitute a variation of the terms on which they agreed to participate before the Court.²² In the absence of consent on the part of the witnesses “to the use of their transcripts in the Article 70 case or the disclosure of their identities to persons other than the participants in the Main Case”, the defence considers that the preconditions for the application of Regulation 42 have not been met.²³

11. In addition, the defence submits that the prosecution’s request unnecessarily exposed the Chamber to incriminating allegations from case ICC-01/05-01/13 in order to circumvent the Chamber’s decision rejecting the admission of evidence from case ICC-01/05-01/13 in the *Bemba* case.²⁴ According to the defence, inclusion of “specific and elaborate information” from case ICC-01/05-01/13 in the Second Prosecution Request would require the defence to enter “into the very type of parallel and competing litigation that the Trial Chamber’s earlier ruling sought to avoid”.²⁵

12. [REDACTED]

II. Analysis and Conclusion

13. For the purpose of the present Decision and in accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles

²² ICC-01/05-01/08-3094-Red, paragraph 10.

²³ ICC-01/05-01/08-3094-Red, paragraph 10.

²⁴ Referring to the ‘Decision on “Prosecution’s Application to Submit Additional Evidence”’, 2 April 2014, ICC-01/05-01/08-3029.

²⁵ ICC-01/05-01/08-3094-Red, paragraphs 14 to 17.

64(2), (6)(c) and (e), 67, 68, and 74 of the Statute, Rules 77 and 87 of the Rules of Procedure and Evidence ("Rules"), and Regulations 42 of the Regulations.

14. The Chamber notes that by virtue of the requested disclosure only a limited number of individuals would be permitted to view the transcripts; all of these individuals are bound by confidentiality obligations. The Chamber, in line with its reasoning in Decision 3074,²⁶ considers that disclosure of transcripts does not amount to a variance of protective measures under Regulation 42(3) of the Regulations. As such, the requirement under Regulation 42(4) that the Chamber seek to obtain the consent of the witnesses concerned is not applicable.

15. Regarding the defence's concern that Witnesses D04-06 and D04-13 no longer benefit from assistance by the VWU, and that therefore disclosure of their identity would be "disproportionately prejudicial",²⁷ the Chamber notes that protective measures ordered under Rule 87(3) of the Rules are directed at preventing protected information from release *to the public, press and information agencies*.²⁸ The Chamber is satisfied that as long as the protective measures remain unchanged in case ICC-01/05-01/13, disclosure of the transcripts to Pre-Trial Chamber II and the parties and participants in case ICC-01/05-01/13, all of whom are bound to respect the confidentiality of the transcripts and the information contained therein, would not have a negative impact on the "safety, physical and

²⁶ ICC-01/05-01/08-3074-Conf, paragraph 17.

²⁷ ICC-01/05-01/08-3094-Red, paragraph 7.

²⁸ ICC-01/05-01/08-3074-Conf, paragraph 17.

psychological well-being, dignity and privacy of [the] witnesses” concerned.²⁹

16. In addition, the Chamber recalls its previous finding that measures taken in case ICC-01/05-01/13 fall under the competence of the Single Judge of Pre-Trial Chamber II and that the Trial Chamber lacks competence in relation to matters arising from that case.³⁰ Consequently, the Chamber finds that arguments relating to the prosecution’s authorisation to submit evidence in case ICC-01/05-01/13 are outside of this Chamber’s competence.

17. Further, the Chamber observes that the defence’s submissions concerning [REDACTED] are unrelated to the Second Prosecution Request and as such, the Chamber will not address them. The Chamber also notes that [REDACTED].

18. Turning to the defence’s submission that the prosecution “has deliberately included specific and elaborate information from case ICC-01/05-01/13 in its request, in order to circumvent the Trial Chamber’s exclusion of this evidence from its consideration”,³¹ the Chamber notes that in line with its approach in the First Prosecution Request, the prosecution provides the Chamber with information in order to substantiate the necessity of disclosing any document in case ICC-01/05-01/13.³² The Chamber finds

²⁹ ICC-01/05-01/08-3074-Conf, paragraphs 17 to 18.

³⁰ See Decision on “Defence Motion on Privileged Communications”, 3 June 2014, ICC-01/05-01/08-3038, paragraph 35; Decision on the prosecution’s request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Red, paragraph 21; and Decision on the Defence Request for Interim Relief, 2 May 2014, ICC-01/05-01/08-3059, paragraphs 15 to 18.

³¹ ICC-01/05-01/08-3094-Red, paragraph 14.

³² ICC-01/05-01/08-3074-Conf, paragraph 16.

that the information provided is sufficiently general, and does not expose the Chamber to “specific and elaborate” information. The Chamber further recalls that its decision pursuant to Article 74 of the Statute will be based solely on evidence submitted and discussed before it at the trial, namely the transcripts of the testimony of 77 witnesses and 700 items of documentary evidence.³³


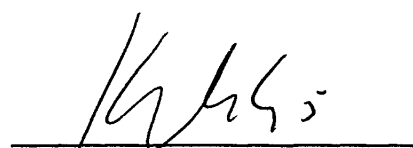
19. In view of the foregoing, and subject to the conditions below, the Chamber authorises the prosecution to disclose the unredacted versions of the transcripts of Witnesses D04-06 and D04-13 in case ICC-01/05-01/13.

20. The Chamber orders that the protective measures ordered in respect of Witnesses D04-06 and D04-13 by Trial Chamber III be applied *mutatis mutandis* before Pre-Trial Chamber II and that their transcripts be afforded the corresponding level of confidentiality. When disclosing the requested transcripts, the prosecution must inform the defence in case ICC-01/05-01/13 of the nature of the protective measures granted to the two witnesses concerned and the level of confidentiality of the transcripts from the *Bemba* case.

21. For the above reasons, the Chamber hereby grants the Second Prosecution Request, subject to the conditions imposed in paragraph 20 above.

³³ Decision on closure of evidence and other procedural matters, 7 April 2014, ICC-01/05-01/08-3035, paragraph 3, and Decision on the 'Prosecution's Submission pursuant to the Order on the classification of items admitted into evidence' and other evidentiary issues, 26 May 2014, ICC-01/05-01/08-3072-Conf, paragraph 10. A public redacted version of the Decision on the 'Prosecution's Submission pursuant to the Order on the classification of items admitted into evidence' and other evidentiary issues was filed and notified on 27 May 2014, ICC-01/05-01/08-3072-Red.

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


Judge Sylvia Steiner
Judge Joyce Aluoch
Judge Kuniko Ozaki

Dated this 26 June 2014

At The Hague, the Netherlands