

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 August 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

Decision on "Transmission of a Submission from the Defence for Mr. Fidèle Babala Wandu in case ICC-01/05-01/13"

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

**Other
Pre-Trial Chamber II**

Trial Chamber III ("Chamber") of the International Criminal Court ("Court" or "ICC") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") issues the following Decision on "Transmission of a submission from the Defence of Mr. Fidèle Babala Wandu in case ICC-01/05-01/13" ("Decision").

I. Background and submissions

1. On 18 July 2014, the Registry filed its "Transmission of a submission from the Defence of Mr. Fidèle Babala Wandu in case ICC-01/05-01/13",¹ in which it transmitted a submission entitled "Requête URGENTE de la Défense de M. Babala dans l'affaire ICC-01/05-01/13 tendant à obtenir de la Chambre préliminaire II l'autorisation d'accès aux Annexes confidentielles du document ICC-01/05-01/08-346-Conf dans l'affaire *le Procureur c. Jean-Pierre Bemba Gombo*" ("Request"),² from Mr Fidèle Babala Wandu's defence ("Mr Babala's defence") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido* ("case ICC-01/05-01/13").
2. Mr Babala's defence requests that the Chamber grant it access to the confidential annexes of the *Bemba* case filing entitled "Submission of confidential redacted versions of documents pursuant to the Decision on Re-

¹ Transmission of a Submission from the Defence for Mr. Fidèle Babala Wandu in case ICC-01/05-01/13, 18 July 2014, ICC-01/05-01/08-3106-Conf and confidential Annex 1. The Chamber notes that the Registry's submission, its annex, and the related submissions, are classified as confidential since the documents sought by Mr Babala's defence are classified as confidential. However, in light of the principle of publicity under Article 64(7) and 67(1) of the Rome Statute and Regulation 20 of the Regulations of the Court, the present Decision is classified as public. To the extent that the Decision makes reference to confidential filings, the Chamber is of the view that reference to these documents does not undermine the confidentiality of the information.

² Requête URGENTE de la Défense de M. Babala dans l'affaire ICC-01/05-01/13 tendant à obtenir de la Chambre préliminaire II l'autorisation d'accès aux Annexes confidentielles du document ICC-01/05-01/08-346-Conf dans l'affaire *le Procureur c. Jean-Pierre Bemba Gombo*, 17 July 2014, ICC-01/05-01/08-3106-Conf-Anx1.

classification of Monitoring Reports” (“Annexes 1 to 10”),³ concerning the use of codes between Mr Fidèle Babala Wandu (“Mr Babala”) and Mr Jean-Pierre Bemba Gombo (“Mr Bemba”).⁴ In this regard, Mr Babala’s defence submits that the defence for Mr Bemba in case ICC-01/05-01/13, in its “Defence objection to the form of the document containing the charges”,⁵ referred to the use of codes between Mr Bemba and Mr Babala, which was “previously examined by HHJ Trendafilova ... and found not to be motivated by any criminal purpose”.⁶ According to Mr Babala’s defence, it follows from this reference that Pre-Trial Chamber III, in the *Bemba* case, already ruled on the use of codes between Mr Babala and Mr Bemba.⁷

3. Mr Babala’s defence further submits that in case ICC-01/05-01/13, Mr Bemba is accused of using codes and that the Single Judge in that case dismissed its request for reclassification of the Annexes, considering that “a request for reclassification of documents pertaining to the *Bemba* case should be addressed to Trial Chamber III”.⁸
4. On 1 August 2014, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Response to ‘*Requête URGENTE de la Défense de M. Babala dans l’affaire ICC-01/05-01/13 tendant à obtenir de la Chambre de première instance III l’autorisation d’accès aux Annexes confidentielles du document ICC-01/05-01/08-*”

³ Submission of confidential redacted versions of documents pursuant to the Decision on Re-classification of Monitoring Reports, 6 January 2009, ICC-01/05-01/08-346-Conf-Anx1 to 10.

⁴ ICC-01/05-01/08-3106-Conf-Anx1, page 6.

⁵ Defence objection to the form of the document containing the charges, 3 July 2014, ICC-01/05-01/13-530-Corr-Red.

⁶ ICC-01/05-01/08-3106-Conf-Anx1, paragraph 7. Mr Bemba’s defence in case ICC-01/05-01/13 refers to the “Submission of confidential redacted versions of documents pursuant to the Decision on Re-classification of Monitoring Reports”, 6 January 2008, ICC-01/05-01/08-346.

⁷ ICC-01/05-01/08-3106-Conf-Anx1, paragraph 8.

⁸ ICC-01/05-01/08-3106-Conf-Anx1, paragraphs 10 and 12. Mr Babala’s defence refers to the “Decision on the ‘Defence objection to the form of the document containing the Charges’ submitted by the Defence for Mr Bemba on 2 July 2014 and on the ‘Requête urgente de la Défense tendant à obtenir de la Chambre préliminaire II l’autorisation d’accès aux Annexes confidentielles du document ICC-01/05-01/08-346-Conf dans l’affaire le Procureur c. Jean-Pierre Bemba Gombo’ submitted by the Defence for Mr Babala on 7 July 2014”, 11 July 2014, ICC-01/05-01/13-561, page 5.

346-Conf dans l'affaire le Procureur c. Jean-Pierre Bemba Gombo", in which it urges the Chamber to reject the Request.⁹ The prosecution asserts that the issues raised by Mr Babala's defence are unsubstantiated and "fail to demonstrate that the material sought is either relevant evidence or information material to the preparation of the Babala Defence under Rule 77 of the Rules of Procedure and Evidence ("Rules")."¹⁰ The prosecution further submits that the Request "erroneously claims, in vague terms, that ... [ICC-01/05-01/08-346-Conf] and its annexes relate to a ruling by the Single Judge of Pre-Trial Chamber III ... on the use of codes between Mr. Bemba and Mr. Babala".¹¹ In this regard, the prosecution stresses that the documents sought by Mr Babala's defence "do not comprise a judicial ruling, but instead emanate from the Registry" and contain "monitoring reports that have been reclassified as 'confidential', following the Registry's application of redactions, in accordance with PTC III's order to 'remove all information relating to the proper management of the Court detention centre and to the privacy of the detained person ...'"¹²

5. Finally, the prosecution contends that the Request simply states that the use of coded language is an issue in the Article 70 case, "without any justification as to how the annexes are material to their preparation under Rule 77, or why any such document issued in a different context several years ago would be relevant".¹³

⁹ Prosecution's Response to "Requête URGENTE de la Défense de M. Babala dans l'affaire ICC-01/05-01/13 tendant à obtenir de la Chambre de première instance III l'autorisation d'accès aux Annexes confidentielles du document ICC-01/05-01/08-346- Conf dans l'affaire le Procureur c. Jean-Pierre Bemba Gombo", 1 August 2014, ICC-01/05-01/08-3110-Conf, paragraph 7.

¹⁰ ICC-01/05-01/08-3110-Conf, paragraphs 2 and 6.

¹¹ ICC-01/05-01/08-3110-Conf, paragraph 4.

¹² ICC-01/05-01/08-3110-Conf, paragraph 5, referring to the "Submission of confidential redacted versions of documents pursuant to the Decision on Re-classification of Monitoring Reports", 6 January 2009, ICC-01/05-01/08-346, page 3.

¹³ ICC-01/05-01/08-3110-Conf, paragraph 6.

6. On 5 August 2014, the Registry filed its “Registry’s observations in relation to the Transmission of a submission from the Defence for Mr. Fidèle Babala Wandu in case ICC-01/05-01/13 (ICC-01/05-01/08-3106-Conf)” (“Registry Observations”).¹⁴ The Registry submits that Annex 1, which contains information pertaining to conversations between Mr Bemba and Mr Babala should retain its current classification since it contains information not pertaining to conversations between Mr Bemba and Mr Babala and “focuses primarily on the manner in which the Registry conducted the monitoring and the difficulties it encountered”.¹⁵ The Registry further submits that Annexes 3, 5, 6 and 9 also need not be reclassified because they contain information “relating to the methodology used by the Registry and other administrative information or instructions from the Chief Custody Officer on how the monitoring of communications would be implemented which are not relevant to the Defence for FB considering the scope of its request”.¹⁶ Finally, the Registry submits that Annexes 2, 4, 7, 8 and 10 “may be reclassified subject to some redactions or proposals to be made by the Defence for Mr. Jean-Pierre Bemba Gombo”.¹⁷

7. On 7 August 2014, the Defence for Mr Jean Pierre Bemba (“Mr Bemba’s defence”) filed its “Defence Observations to filing ICC-01/05-01/0[8]-3106”.¹⁸ The defence submits that “it has no observations to make as to why the request should not be granted”.¹⁹ In addition, the defence for Mr Bemba submits that the relevance of the material in the “preparation of the Defence of both Mr Babala and Mr Bemba is clear” and that “arguably it was the

¹⁴ Registry’s observations in relation to the Transmission of a submission from the Defence for Mr. Fidèle Babala Wandu in case ICC-01/05-01/13 (ICC-01/05-01/08-3106-Conf), 5 August 2014, ICC-01/05-01/08-3111-Conf.

¹⁵ ICC-01/05-01/08-3111-Conf, page 4.

¹⁶ ICC-01/05-01/08-3111-Conf, pages 4 and 5.

¹⁷ ICC-01/05-01/08-3111-Conf, page 4.

¹⁸ Defence Observations to filing ICC-01/05-01/0[8]-3106, 7 August 2014, ICC-01/05-01/08-3112-Conf, paragraph 1.

¹⁹ ICC-01/05-01/08-3112-Conf, paragraph 3.

prosecutor's duty to seek the leave of this Chamber to disclose the material in the first place".²⁰

II. Analysis

8. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber has considered Article 64(6)(c) and (f) of the Statute.

9. As a preliminary matter, the Chamber notes that in paragraph 13 of its Request, Mr Babala's defence requests that the Chamber "reclassify" the Annexes. In the relief sought, it requests that the Chamber "grant it access to the confidential annexes".²¹ The Registry Observations address the question of whether the relevant documents "can be reclassified and made accessible to [Mr Babala's defence]".²² Considering that Mr Babala's defence seeks access to the documents, which does not necessarily entail alteration to the level of confidentiality, the Chamber will treat the Request as a request for access to documents and not as a request for reclassification.

10. The Chamber previously ruled that "any request for access to a document classified as 'confidential', 'ex parte', or 'under seal' must be specific and would need to be assessed in light of the nature and content of the document. Moreover, a legal and factual justification for such a request must be provided".²³

11. In the present case, Mr Babala's defence requests access to 10 confidential

²⁰ ICC-01/05-01/08-3112-Conf, paragraph 4.

²¹ ICC-01/05-01/08-3106-Conf-Anx1, page 6.

²² ICC-01/05-01/08-3111-Conf, page 4.

²³ Decision on "Transmission of a submission from Mr. Nick Kaufman dated 22 January 2014", 13 February 2013, ICC-01/05-01/08-2972, paragraph 9.

annexes to document ICC-01-/05-01/08-346, arguing that they relate to the use of codes between Mr Bemba and Mr Babala. According to Mr Babala's defence, this is an issue in case ICC-01/05-01/13,²⁴ which is important for his defence in that case.²⁵

12. The Chamber notes that Annexes 1, 3, 5 and 6 are redacted versions of four monitoring reports prepared by the Registry and Annex 9 is an internal memorandum of the Registry. As these documents primarily focus on the methodology of the monitoring system used by the Registry, and in view of the Registry Observations, the Chamber rejects Mr Babala's request for access to Annexes 1, 3, 5, 6 and 9.

13. As to Annexes 2, 4, 7, 8 and 10, the Chamber notes that they contain a description of communications between Mr Bemba and other individuals, including Mr Babala, and the use of codes in these conversations. In view of the submissions of the Registry and the defence outlined above,²⁶ the Chamber sees no impediment to allowing Mr Babala's defence access to Annexes 2, 4, 7, 8 and 10. However, the Chamber notes the Registry's recommendations as to the possible need for redactions prior to the defence for Mr Babala being granted access to these documents. Accordingly, the Chamber directs Mr Bemba's defence to review the relevant documents in order to determine whether, in light of the Registry's observations, further redactions are necessary prior to Mr Babala's defence being granted access.

²⁴ ICC-01/05-01/08-3106-Conf-Anx1, paragraphs 7, 8 and 10.

²⁵ ICC-01/05-01/08-3106-Conf-Anx1, paragraph 4.

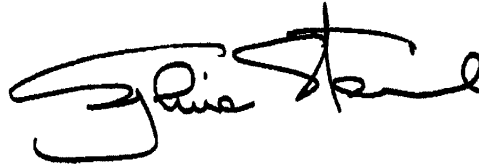
²⁶ See ICC-01/05-01/08-3112-Conf, paragraph 3 and ICC-01/05-01/08-3111-Conf, page 4.

III. Disposition

14. In view of the above, the Chamber hereby

- (i) REJECTS Mr Babala's defence request for access to documents ICC-01/05-01/08-346-Conf-Anx1; ICC-01/05-01/08-346-Conf-Anx3; ICC-01/05-01/08-346-Conf-Anx5; ICC-01/05-01/08-Conf-Anx6 and ICC-01/05-01/08-Conf-Anx9;
- (ii) GRANTS Mr Babala's defence request for access to documents ICC-01/05-01/08-346-Conf-Anx2; ICC-01/05-01/08-346-Conf-Anx4; ICC-01/05-01/08-346-Conf-Anx7; ICC-01/05-01/08-Conf-Anx8 and ICC-01/05-01/08-Conf-Anx10, subject to the implementation of any redactions considered necessary by Mr Bemba's defence;
- (iii) DIRECTS Mr Bemba's defence to inform the Registry, by 28 August 2014, whether additional redactions to the documents listed in 14 (ii) above are necessary, or whether the documents may be transmitted to the record in case ICC-01/05-01/13 without additional redactions;
- (iv) DIRECTS the Registry, in line with the information provided by the defence pursuant to paragraph 14 (iii), to transmit the documents to the record of the case ICC-01/05-01/13.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 21 August 2014

At The Hague, the Netherlands