

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 23 January 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**

Public

**Decision on “Prosecution’s Third Request for Access to Evidence for 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

Mr Nigel Verrill

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 Third Request for Access to Evidence for 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 granted a request by the Office of the Prosecutor (“prosecution”)² for authorisation to disclose, *inter alia*, the confidential (unredacted) versions of the transcripts of the testimony of 15 witnesses from the Bemba case 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”).³
2. On 26 June 2014, the Chamber issued its “Decision on ‘Prosecution’s Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding’”, in which it authorised the prosecution to disclose the confidential versions of the transcripts of the testimony of two additional witnesses from the Bemba case in case ICC-01/05-01/13 (“Decision 3098”).⁴

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.

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, paragraph 19. The relevant transcripts were those of the testimony of Witnesses D04-64, D04-57, D04-55, D04-54, D04-45, D04-29, D04-26, D04-25, D04-23, D04-15, D04-7, D04-04, D04-03, D04-02, and CHM-01.

⁴ Decision on ‘Prosecution’s Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding’, 26 June 2014, ICC-01/05-01/08-3098-Conf. A redacted version of the Decision was filed on the same day. The relevant transcripts were those of the testimony of Witnesses D04-06 and D04-13.

3. On 17 December 2014, the prosecution filed its "Prosecution's Third Request for Access to Evidence for a Related Article 70 Proceeding", ("Prosecution Request" or "Request"),⁵ in which it requests that the Chamber grant the parties in case ICC-01/05-01/13 access to the confidential video recordings of the trial hearings of 17 witnesses called by the defence for Mr Jean-Pierre Bemba ("defence") and the Chamber in relation to whom the Chamber has already authorised disclosure of the confidential versions of the transcripts.⁶
4. In support of its Request, the prosecution submits that the video recordings are relevant in case ICC-01/05-01/13 since they provide "pivotal additional evidence" to that case, "bear directly on the truthfulness of the witnesses' prior evidence", and "show the witnesses' demeanour and body language during the course of their testimony".⁷ The prosecution states that this "information is highly relevant to the determination of the credibility of witnesses' evidence, which is a material issue in the recently-confirmed Article 70 case".⁸ According to the prosecution, it is "necessary for the Prosecution to obtain access to the confidential versions of the video recordings, because all 17 witnesses testified with protective measures and thus their face and voice are distorted in the public versions of the video recordings."⁹ In addition, the

⁵ Prosecution's Third Request for Access to Evidence for a Related Article 70 Proceeding, 17 December 2014, ICC-01/05-01/08-3218-Conf. The Chamber notes that the Request is classified as confidential. However, the Chamber considers that its reference to the Request and other confidential filings does not warrant confidential classification of this Decision. Accordingly, in light of the principle of publicity enshrined in Articles 64(7) and 67(1) of the Rome Statue and Regulations 20 and 23*bis* of the Regulations of the Court, the present Decision is classified as public.

⁶ ICC-01/05-01/08-3218-Conf, paragraphs 1, 2 and 14.

⁷ ICC-01/05-01/08-3218-Conf, paragraph 6.

⁸ ICC-01/05-01/08-3218-Conf, paragraph 6.

⁹ ICC-01/05-01/08-3218-Conf, paragraph 8.

prosecution submits that “discussions relevant to the prosecution of the Article 70 case take place in private or closed session, which means that the video is either disseminated without audio to the public, or not at all”.¹⁰ The prosecution further submits that there are no additional security concerns for the witnesses associated with its Request since the accused in case ICC-01/05-01/13 are either already familiar with the witnesses’ voice and appearance from their participation in the *Bemba* case,¹¹ or “bound to respect the confidentiality of such information”,¹² “as they are vis-à-vis the unredacted trial transcripts, which contain the witnesses’ identities”.¹³

5. In addition, the prosecution incorporates, by reference,¹⁴ its submissions from its first request for disclosure,¹⁵ including the legal basis for the requested access,¹⁶ the prosecution’s disclosure obligations,¹⁷ and the absence of additional risk to witnesses.¹⁸ The prosecution submits that, should the Chamber grant the Request, the prosecution will inform the defence in case ICC-01/05-01/13 of the confidentiality level of the video recordings, in accordance with Decisions 3074 and 3098 and Regulation 42(2) of the Regulations of the Court (“Regulations”).¹⁹ Lastly, the prosecution asserts that granting the Request would cause no prejudice to

¹⁰ ICC-01/05-01/08-3218-Conf, paragraph 8.

¹¹ ICC-01/05-01/08-3218-Conf, paragraph 9. The prosecution refers to the accused Aimé Kilolo Musamba, Jean-Pierre Bemba Gombo and Jean-Jacques Mangenda Kabongo.

¹² ICC-01/05-01/08-3218-Conf, paragraph 9 (internal citations omitted). The prosecution refers to the accused Fidèle Babala Wandu and Narcisse Arido.

¹³ ICC-01/05-01/08-3218-Conf, paragraph 9.

¹⁴ ICC-01/05-01/08-3218-Conf, paragraph 10.

¹⁵ ICC-01/05-01/08-3052-Red.

¹⁶ ICC-01/05-01/08-3052-Red, paragraphs 7 to 12.

¹⁷ ICC-01/05-01/08-3052-Red, paragraphs 13 to 18.

¹⁸ ICC-01/05-01/08-3052-Red, paragraph 21.

¹⁹ ICC-01/05-01/08-3218-Conf, paragraph 11.

the defence, whose interests are “unaffected” by the Request, and that it is “also manifestly in the interest of justice, preserving the integrity of proceedings before the Court by permitting access to evidence vital to the prosecution of the Article 70 case”.²⁰

6. On 20 January 2015, the defence filed its “Defence Response to ‘Prosecution Third Request for Access to Evidence for a Related Article 70 Proceeding’” (“Defence Response”), in which it requests that the Chamber reject the Prosecution Request.²¹

II. Analysis and Conclusion

7. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Chamber has considered Articles 64(2), (6)(c) and (e), and (7)(1), 67 and 68 of the Statute, Rule 87 of the Rules of Procedure and Evidence (“Rules”), and Regulations 19*bis*(2), 20, 23*bis*, 33, 34 and 42 of the Regulations.
8. As a preliminary matter, the Chamber notes that the Defence Response was filed on 20 January 2015, while, in accordance with Regulations 19*bis*(2), 33 and 34 of the Regulations, the time limit for responses to the Request expired on 7 January 2015.²² Absent any decision suspending the time limits during the winter recess, and considering that the defence failed to request an extension of time or justify the late submission, the

²⁰ ICC-01/05-01/08-3218-Conf, paragraph 12.

²¹ Defence Response to ‘Prosecution Third Request for Access to Evidence for a Related Article 70 Proceeding’, 20 January 2015, ICC-01/05-01/08-3237-Conf.

²² In accordance with Regulation 33(1)(d) of the Regulations, the response should have been filed at the latest on 8 January 2015.

Chamber will not consider the Defence Response for the purpose of the present Decision.

9. In Decisions 3074 and 3098, the Chamber held that, pursuant to Rule 87(3) of the Rules, information 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 information protected by such measures were not released to the “public or press and information agencies”.²³ The Chamber therefore authorised the prosecution to disclose the requested confidential transcripts in case ICC-01/05-01/13, under the condition that the protective measures ordered by Trial Chamber III be applied *mutatis mutandis* before Pre-Trial Chamber II, that the transcripts be afforded the corresponding level of confidentiality and that the prosecution inform the defence in case ICC-01/05-01/13 of the nature of the protective measures granted to the witnesses concerned and the level of confidentiality of the transcripts from the *Bemba* case.²⁴

10. The current Prosecution Request is limited to the video recordings of the hearings of those witnesses whose confidential transcripts the Chamber previously authorised the prosecution to disclose. Accordingly, the identities of the relevant witnesses are already known to the accused and all defence teams in case ICC-01/05-01/13. In addition, access to the video recordings would be confined to a limited number of individuals who are all bound by confidentiality obligations. The Chamber further reminds the

²³ ICC-01/05-01/08-3074, paragraph 17; ICC-01/05-01/08-3098-Red, paragraph 15.

²⁴ ICC-01/05-01/08-3074, paragraph 20; ICC-01/05-01/08-3098-Red, paragraph 20.

prosecution of its commitment to comply with the conditions imposed in Decisions 3074 and 3098,²⁵ as well as Regulation 42(2) of the Regulations, and to inform the defence in case ICC-01/05-01/13 of the confidentiality level of the video recordings. As a result, the Chamber considers that granting the Request would not have a negative impact on the “safety, physical and psychological well-being, dignity and privacy” of the witnesses concerned.²⁶

11. In view of the foregoing, the Chamber hereby

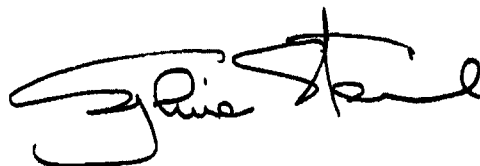
(a) GRANTS the Prosecution Request; and

(b) ORDERS the parties to file public redacted versions of the Prosecution Request and the Defence Response or to inform the Chamber that they can be reclassified as public without redactions by 2 February 2015.

²⁵ ICC-01/05-01/08-3074, paragraph 20; ICC-01/05-01/08-3098-Red, paragraph 20.

²⁶ See ICC-01/05-01/08-3074, paragraph 18 and ICC-01/05-01/08-3098-Red, paragraph 15.

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



Judge Sylvia Steiner



Dated this 23 January 2015

At The Hague, the Netherlands