

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 18 September 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 “Registry Transmission of a Joint Request received from the
Defence teams in the Bemba *et al.* case (ICC-01/05-01/13)”**

No. ICC-01/05-01/08

1/15

18 September 2015

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

Trial Chamber VII

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 “Registry Transmission of a Joint Request received from the Defence teams in the Bemba *et al.* case (ICC-01/05-01/13)” (“Decision”).

I. Background

1. On 12 August 2015, the Registry transmitted a joint request from four defence teams in the case of *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”), dated 10 August 2015, and entitled “Urgent Joint Request for Access to Confidential Material” (“Request”).¹ In the Request, the case ICC-01/05-01/13 defence teams for Mr Aimé Kilolo Musamba, Mr Jean-Jacques Kabongo Mangenda, Mr Fidèle Babala Wandu and Mr Narcisse Arido (collectively, “Defence Teams”) request that they be granted access, pursuant to Regulation 42 of the Regulations of the Court (“Regulations”), to the following materials (“Requested Material”):²

- (a) All confidential transcripts in the Main Case, including of all Prosecution and Chamber witnesses (“all confidential transcripts”);
- (b) All confidential exhibits in the Main Case (“all confidential exhibits”);
- (c) All confidential *inter partes* or *ex parte* filings by the Chamber, the Prosecution, Defence, or any organ of the Registry or from any other source whatsoever “(respectively, “all confidential filings” and “all *ex parte* filings”);

¹ Registry Transmission of a Joint Request received from the Defence teams in the Bemba *et al.* case (ICC-01/05-01/13), 12 August 2015, ICC-01/05-01/08-3282-Conf-Exp and Conf-Exp-AnxA.

² ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 22.

- (d) All confidential *inter partes* communications by the Trial Chamber, Prosecution, Defence, or any organ of the Registry, to any party (“all confidential communications”); and
 - (e) All confidential disclosure provided by the Prosecution to the Defence in the Main Case (“all confidential disclosure”).
2. On 2 September 2015, the Office of the Prosecutor (“Prosecution”) filed its “Prosecution’s Response to ‘Urgent Joint Request for Access to Confidential Material’” (“Prosecution Response”),³ in which it requests that the Chamber reject the Request in its entirety.⁴
 3. The defence for Mr Jean-Pierre Bemba in the *Bemba* case did not submit any response to the Request.

II. Submissions

Defence Teams

4. The Request is premised on Regulations 42(1) and 42(3) of the Regulations, which, according to the Defence Teams, “contemplate that confidential information from one case may be transmitted to the parties in another subject to the same measures of witness protection ordered in the first case”.⁵ The Defence Teams stress that the Chamber “has previously suggested that transmission of confidential information from one case to another does *not* constitute a ‘variation of protective measures’ at all, as long as the same restrictions apply *mutatis mutandis* to the

³ Prosecution’s Response to “Urgent Joint Request for Access to Confidential Material”, 2 September 2015, ICC-01/05-01/08-3291-Conf-Exp and Conf-Exp-AnxA.

⁴ ICC-01/05-01/08-3291-Conf-Exp, para. 18.

⁵ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 3.

recipients thereof”.⁶ “Even assuming that it is a ‘variation’”, the Defence Teams argue that “the application of the same protective measures *mutatis mutandis* is a factor favouring sharing the material”,⁷ and recall that the Chamber has previously recognised that the consultation requirement under Regulation 42(4)⁸ “is not absolute and applies only ‘whenever possible’”.⁹

5. Regarding the criteria for granting access to confidential material under Regulation 42(3), the Defence Teams refer to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda, as recently summarised:¹⁰

[I]t is well established that a party may obtain confidential material from another case to assist in the preparation of its case, if (a) the material sought has been ‘identified or described by its general nature’ and (b) a ‘legitimate forensic purpose’ exists for such access.” [...] a ‘legitimate forensic purpose’ for disclosure in subsequent proceedings will be shown if the applicant can demonstrate that the material is relevant and essential. The relevance of such material may be determined ‘by showing the existence of a nexus between the applicant’s case and the original case from which the material is sought.’ To establish a nexus, the applicant is required to demonstrate a ‘geographical, temporal or otherwise material overlap’ between the two proceedings. The essential nature of the material, in turn, means that the party seeking it must demonstrate ‘a good chance that access to this evidence will materially assist the applicant in preparing his case.’ [...]

⁶ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 4, referring to Decision on “Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding”, 12 March 2014, ICC-01/05-01/08-3014, para. 15.

⁷ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 5.

⁸ Regulation 42(4) provides: “Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.”

⁹ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 6, referring to ICC-01/05-01/08-3014, para. 18.

¹⁰ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 7, quoting ICTY, *The Prosecutor v. Hadžić*, IT-04-75-T/IT-95-11-A, Decision on Defence Motion for Access to Confidential Material in *Prosecutor v. Milan Martić*, 17 April 2014, paras 5 to 8.

6. The Defence Teams argue that material from the *Bemba* case has a nexus to case ICC-01/05-01/13, insofar as “[a] central allegation in the Article 70 Case is that the co-accused have ‘aided and abetted’ the crime of ‘[g]iving false testimony’. An element of this offence is that the testimony provided is false.”¹¹ They further stress that the Prosecution itself confirmed the nexus between both cases,¹² and argue that other elements of confidential material in the *Bemba* case, such as modalities and reasons for contacting witnesses, are “directly relevant for the defences of both Mr. Kilolo and Mr. Mangenda”.¹³
7. The Defence Teams further submit that they have “reason to believe” that confidential information is exculpatory and that the Prosecution’s disclosure of “virtually no documents to the [case ICC-01/05-01/13] Defence from the [*Bemba* case] pursuant to Article 67(2) [...] should be a cause of concern”.¹⁴ Moreover, the Defence Teams argue that the testimony of Prosecution witnesses “is relevant not only to the truthfulness of the propositions that the Prosecution claims constitute false testimony, but may be probative of other issues as well”.¹⁵ Regarding filings concerning the modalities of trial, the timing of the appearance of witnesses, periods of adjournment and other procedural issues, the Defence Teams claim that, while their ability to establish the relevance of Requested Material with precision is “precluded by [their] lack of access

¹¹ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 11.

¹² ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 13. The Defence Teams refer to Prosecution Request for Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, 30 January 2014, ICC-01/05-01/08-2951, para. 8.

¹³ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 14.

¹⁴ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 15.

¹⁵ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 17.

to the material”, it cannot be denied that there is a “good chance” that this information will be material to the preparation of the Defence.¹⁶

8. Moreover, the Defence Teams aver that the different levels of access to information available to the parties in case ICC-01/05-01/13 damage the fairness and efficiency of the proceedings in that case, stressing that, for example, neither Mr Arido nor Mr Babala have knowledge of or access to confidential material from the *Bemba* case and “will accordingly be substantially disadvantaged if the other four parties can identify and rely upon such material, whereas they cannot”. In addition, the Defence Teams argue that different levels of access to information would obligate the case ICC-01/05-01/13 Prosecution and defence team for Mr Bemba to file part of the material as *ex parte* which would be “unfair, as well as obstructing the smooth and efficient conduct of proceedings”.¹⁷
9. Finally, the Defence Teams submit that “[n]o witness protection concerns outweigh the need for disclosure, since three of the five defendants[...] already know all protected witnesses’ identities, and all five would be bound by the same restrictions *mutatis mutandis* as those applicable to the Defence in the [*Bemba* case].”¹⁸

Prosecution

10. At the outset, the Prosecution highlights that the Defence Teams simultaneously filed “a similar but more limited request” for disclosure

¹⁶ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 17.

¹⁷ ICC-01/05-01/08-3282-Conf-Exp-AnxA, paras 18 to 20.

¹⁸ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 21.

and access to confidential material in the *Bemba* case in case ICC-01/05-01/13 (“Simultaneous Disclosure and Access Request”).¹⁹ It adopts its submissions made in that case,²⁰ including that “Trial Chamber III is the appropriate recourse”.²¹

11. The Prosecution submits that the present Request “goes beyond the four categories sought in the Simultaneous Disclosure and Access Request” and “lacks sufficient specificity and justification to enable an assessment of whether access is warranted”.²² To the extent that the Request includes material that is relevant to the proceedings in case ICC-01/05-01/13, which fall within the possession or control of the Prosecution, the Prosecution submits that it should be dismissed because those items have been disclosed to all Defence Teams in case ICC-01/05-01/13 and since the Request “fails to identify any such relevant material that remains undisclosed, and sufficiently justify its materiality”.²³

12. The Prosecution further submits that the Request “fails to meet the requisite threshold” for access to material, since such requests should “at the very least, identify specific categories of information or relevant issues that are material to the Defence preparation, and also sufficiently demonstrate the legitimate forensic purpose.”²⁴ In this regard, the Prosecution explains that it is important to contextualise the Defence

¹⁹ ICC-01/05-01/08-3291-Conf-Exp, para. 1.

²⁰ ICC-01/05-01/08-3291-Conf-Exp, para. 6.

²¹ ICC-01/05-01/08-3291-Conf-Exp, para. 6, referring to Prosecution’s Response to “Urgent Joint Request for Order Compelling the Prosecution to Disclose Materials from the Case of *Prosecutor v. Bemba*,” 27 August 2015, ICC-01/05-01/13-1133-Conf-Corr, paras 7 to 8.

²² ICC-01/05-01/08-3291-Conf-Exp, para. 8.

²³ ICC-01/05-01/08-3291-Conf-Exp, para. 10.

²⁴ ICC-01/05-01/08-3291-Conf-Exp, para. 12 (emphasis in original).

Teams' reliance on the threshold articulated in ICTY cases, which relate to a geographical or other material overlap in another case with similar charges for the same or related incidents, while the Request seeks confidential information from the *Bemba* case "where the scope of the charges and relevant issues are quite distinct".²⁵

13. With regard to the alternative request for a variance of protective measures, the Prosecution argues that the views of the Legal Representative and the Victims and Witnesses Unit should be sought prior to granting access to confidential information.²⁶

14. Moreover, the Prosecution argues that the request for access to all *ex parte* filings should be rejected on the basis that the Chamber's previous decision²⁷ was limited to confidential as opposed to *ex parte* filings, and it submits that the Request "fails to provide substantive justification for *ex parte* filings beyond merely arguing that all Defence Counsel are obligated to adhere to confidentiality obligations, and speculatively asserting that unequal access as a result of prior involvement in the [*Bemba* case] would disadvantage other Defence teams".²⁸

²⁵ ICC-01/05-01/08-3291-Conf-Exp, para. 12.

²⁶ ICC-01/05-01/08-3291-Conf-Exp, para. 15.

²⁷ ICC-01/05-01/08-3291-Conf-Exp, para. 16, referring to Decision ICC-01/05-01/08-3014, footnote 53.

²⁸ ICC-01/05-01/08-3291-Conf-Exp, para. 16.

III. Analysis and Conclusion

15. For the purpose of the present Decision the Chamber has considered Articles 64(2), (6), and (7), and 68 of the Rome Statute (“Statute”), Rule 15(1) of the Rules of Procedure and Evidence and Regulations 20, 23*bis* and 42 of the Regulations.
16. As a preliminary matter, the Chamber notes that the Defence Teams filed the Request as confidential *ex parte*, only available to the Defence and Prosecution in the *Bemba* case and case ICC-01/05-01/13, on the basis that it contains “references to documents confidential to the Article 70 Case”. The Defence Teams further submit that “[s]ince the only parties to the [*Bemba* case], the Prosecution and Mr Bemba, both have access to this document [they] do[...] not object to removal of this classification, or to the reclassification of the present filing when the Prosecution re-classifies its Pre-Trial Brief”.²⁹ The Prosecution filed its Response with the same level of classification, specifying that it “does not object to reclassification of this document to allow the Legal Representatives of Victims to submit their observations as access to confidential material in this case concerns them, or reclassification as Public”.³⁰ The Chamber further notes that, in case ICC-01/05-01/13, the Single Judge reclassified the Simultaneous Disclosure and Access Request as public, considering that nothing in that document warranted confidential classification.³¹ The Chamber considers

²⁹ ICC-01/05-01/08-3282-Conf-Exp-AnxA, footnote 1.

³⁰ ICC-01/05-01/08-3291-Conf-Exp, footnote 4.

³¹ Trial Chamber VII, Decision on Defence Requests for Disclosure of Materials from the Record of the Case of The Prosecutor v. Jean-Pierre Bemba Gombo and Related Matters, 27 August 2015, ICC-01/05-01/13-1188, para. 10.

that the same applies to the present Request and therefore, pursuant to Regulation 23*bis*(3), reclassifies the Request and the Prosecution Response as public.³²

17. Before entering into the merits of the Request, the Chamber notes that in case ICC-01/05-01/13, the Single Judge “cautioned the parties that the purpose of [case ICC-01/05-01/13] proceedings is not to re-litigate the [*Bemba* case]”.³³

18. Turning to the merits of the Request, the Chamber notes that, while the Defence Teams refer to both “access” and “disclosure”, the Request constitutes a request for access to material, rather than a request for disclosure. That notwithstanding, the Chamber considers that its previous decisions on Regulation 42 of the Regulations, taken in relation to Prosecution requests for disclosure and relied upon by the Defence Teams in their Request, are of relevance to the present Decision.

19. In those decisions, the Chamber held that disclosure of confidential information from the *Bemba* case to the Defence Teams in case ICC-01/05-01/13 did “not amount to a variance of protective measures under Regulation 42(3) of the Regulations”³⁴ and that:³⁵

as long as the protective measures remain unchanged in case ICC-01/05-01/13, disclosure of the [relevant material] to [the competent chamber] and the parties

³² To the extent that the present Decision refers to confidential documents, the Chamber considers that the reference to these documents does not undermine the confidentiality of the information concerned.

³³ ICC-01/05-01/13-1188, para. 12.

³⁴ Redacted Version of “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-Red, para. 14.

³⁵ ICC-01/05-01/08-3098-Red, para. 15. *See also*, ICC-01/05-01/08-3074, para. 17.

[...] 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 psychological well-being, dignity and privacy of victims and witnesses', concerned.

Having found that disclosure did not amount to a variance of protective measures under Regulation 42(3) of the Regulations, the Chamber further found that "the requirement under Regulation 42(4) that the Chamber seek to obtain the consent of the witnesses concerned [was] not applicable".³⁶ In light of this, the Chamber agrees with the Defence Teams' submission that confidential information from the *Bemba* case *may* be transmitted to the parties in case ICC-01/05-01/13, and that such transmission, in principle, does not amount to a variance of protective measures as long as the same restrictions are applied *mutatis mutandis* to the recipients thereof.

20. Regarding the question of whether the Defence Teams *should* be granted access to the specific Requested Material, the Chamber recalls that, in relation to previous requests made by parties in case ICC-01/05-01/13 for access to confidential material in the *Bemba* case, the Chamber held that such requests should "identify, on the basis of the material that is publicly available, the specific documents consider[ed] to be necessary for the effective representation of [an accused] in case ICC-01/05-01/13 and provide a *substantiated justification* for any specific request".³⁷

³⁶ ICC-01/05-01/08-3098-Red, para. 14.

³⁷ See Decision on "Transmission of a submission from Mr Nick Kaufman dated 22 January 2014", 13 February 2014", ICC-01/05-01/08-2972, paragraph 11; Decision on "Registry Transmission of a Submission received from the Defence for Mr Narcisse Arido dated 18 August 2014", 5 September 2014, ICC-01/05-01/08-3134-Conf, paras 9 and 12 (emphasis added).

21. Moreover, notwithstanding its findings on the applicability of Regulation 42 of the Regulations,³⁸ the Chamber underlines that it is still bound by its duty under Article 68(1) of the Statute “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.³⁹
22. In the present Request, the Defence Teams request access to a broad range of material: (i) all confidential transcripts; (ii) all confidential exhibits; (iii) all confidential filings and all *ex parte* filings; (iv) all confidential communications; and (v) all confidential disclosure. The Chamber notes that granting the Defence Teams access to the Requested Material would result in the Defence Teams having access to sensitive information, in particular, the identifying information relating to all witnesses that were called by the Prosecution, the defence team for Mr Bemba, the Legal Representative, and the Chamber, the majority of whom testified under protective measures.
23. In support of their Request, the Defence Teams provide a general justification, including some examples, rather than specific justifications tailored to each category of material. In the view of the Chamber, the submissions made are not sufficiently substantiated to justify access to the broad range of material, including identifying information in relation to all witnesses who testified in the *Bemba* case.

³⁸ See paragraph 19 above.

³⁹ For a similar approach, see Trial Chamber VI, Order on Defence access to confidential material in the *Lubanga* case, 1 September 2015, ICC-01/04-02/06-806, para. 8.

24. The Chamber further notes that the Defence Teams already have access to all public redacted versions of the transcripts,⁴⁰ as well as all public or public redacted documents in the case file. In addition, the majority of exhibits and items disclosed in the *Bemba* case are either classified as public or available in a public redacted version, and the Chamber will facilitate the Defence Teams' access to such items by virtue of the present Decision. Accordingly, should the Defence Teams make a renewed request for access to confidential information, they should identify, on the basis of the material that is publicly available, the 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.

25. In view of the above, the Chamber hereby:

(a) REJECTS the Defence Teams' Request;

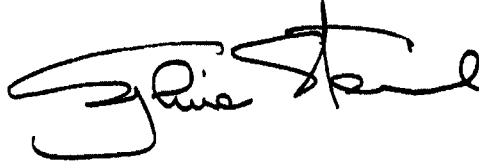
(b) RECLASSIFIES the Request and the Prosecution Response as public;

and

(c) ORDERS the Registry to ensure that all documents in the Ringtail record of the *Bemba* case that are classified as public, including the relevant metadata, be available in the Ringtail record of case ICC-01/05-01/13.

⁴⁰ The process of notification of second (lesser) redacted versions of transcripts pursuant to the Chamber's Third Order on the reclassification of transcripts (ICC-01/05-01/08-3038) was completed on 15 September 2015.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 18 September 2015
At The Hague, the Netherlands