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Date: 1 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***

Public

Decision on “Defence Motion for Reclassification of documents”

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

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 “Defence Motion for Reclassification of documents” (“Decision”).

I. Background and submissions

1. The Chamber, in line with its duty under Article 64(2) of the Rome Statute (“Statute”) to ensure that the trial is fair and conducted with full respect of the rights of the accused, rendered the following two decisions on the reclassification of decisions and documents related to an investigation under Article 70 of the Statute (“Article 70 investigation”) initiated by the Office of the Prosecutor (“prosecution”): (i) Order on the reclassification of documents (“First Order”)¹ and (ii) Second Order on the reclassification of documents related to Decision ICC-01/05-01/08-2606-Conf (“Second Order”),² issued on 6 December 2013 and 22 January 2014, respectively. Pursuant to the First and Second Orders, 16 confidential *ex parte* documents and decisions were reclassified as confidential.³
2. On 17 February 2014, the defence for Mr Jean-Pierre Bemba (“defence”) filed its “Defence Motion for Reclassification of documents” (“Defence

¹ Order on the reclassification of documents, 6 December 2013, ICC-01/05-01/08-2920-Conf. The Chamber notes that the present Decision concerns the reclassification of documents currently classified as confidential or confidential *ex parte*. The Chamber is of the view that its reference to these documents in this instance does not require confidential treatment at this time. Thus, in light of the principle of publicity of the proceedings enshrined in Article 67(1) of the Statute and Regulation 20 of the Regulations of the Court (“Regulations”), the present Decision is filed publicly.

² Second Order on the reclassification of documents related to Decision ICC-01/05-01/08-2606-Conf, 22 January 2014, ICC-01/05-01/08-2943-Conf.

³ See ICC-01/05-01/08-2920-Conf, paragraph 6; ICC-01/05-01/08-2943-Conf, paragraph 4.

Motion”),⁴ in which it requests that the Chamber order the reclassification of decisions and documents related to the Article 70 investigation as public. In an annex to the Defence Motion (“Defence Annex”), the defence requests the reclassification as public of 15 of the 16 documents and decisions reclassified as confidential in the First and Second Orders,⁵ as well as the First and Second Orders themselves.

⁴ Defence Motion for the lifting of redactions of documents, 17 February 2014, ICC-01/05-01/08-2978-Conf with confidential Annex A.

⁵ The defence does not request the reclassification of ICC-01/05-01/08-2548-Conf-AnxA (“Document 2548-Conf-AnxA”), the annex to the prosecution’s “Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence”. The defence does request the reclassification of the following items as public: (1) Prosecution’s Request for Record of Payments made by the Registry to Witnesses called by the Defence of Mr. Jean-Pierre Bemba Gombo, 15 November 2012, ICC-01/05-01/08-2412-Conf (“Document 2412-Conf”), this document was reclassified as confidential on 23 January 2014 pursuant to the Second Order. (2) Decision requesting the Registry’s observations on the prosecution’s request relating to Article 70 investigation, 19 November 2012, ICC-01/05-01/08-2421-Conf (“Decision 2421-Conf”), this document was reclassified as confidential on 9 December 2013 pursuant to the First Order. (3) Registry’s Observations relating to the “Decision requesting the Registry’s observations on the prosecution’s request relating to Article 70 investigations”, 26 November 2012, ICC-01/05-01/08-2441-Conf (“Document 2441-Conf”), this document was reclassified as confidential on 23 January 2014 pursuant to the Second Order, with confidential annexes: (4) ICC-01/05-01/08-2441-Conf-Exp-Anx1 (“Document 2441-Conf-Anx1”), Annex 1 was initially classified as confidential *ex parte* – VWU only. A redacted version of Annex 1 was provided to the prosecution on 14 December 2012, ICC-01/05-01/08-2441-Conf-Exp-Anx1-Red. A lesser redacted version of Annex 1 was provided to the parties and participants on 31 January 2014, ICC-01/05-01/08-2441-Conf-Anx1-Red2 (“Document 2441-Conf-Anx1-Red2”); (5) ICC-01/05-01/08-2441-Conf-Anx2 (“Document 2441-Conf-Anx2”), Annex 2 of Document 2441-Conf was originally classified as confidential *ex parte* – Registry only. Per the Second Order, the document was reclassified as confidential on 23 January 2014; (6) ICC-01/05-01/08-2441-Conf-Anx3 (“Document 2441-Conf-Anx3”), Annex 3 of Document 2441-Conf was originally classified as confidential *ex parte* – Registry only. Per the Second Order, the document was reclassified as confidential on 23 January 2014; (7) ICC-01/05-01/08-2441-Conf-Anx4 (“Document 2441-Conf-Anx4”), Annex 4 of Document 2441-Conf was originally classified as confidential *ex parte* – Registry only. Per the Second Order, the document was reclassified as confidential on 23 January 2014; (8) ICC-01/05-01/08-2441-Conf-Anx5 (“Document 2441-Conf-Anx5”), Annex 5 of Document 2441-Conf was originally classified as confidential *ex parte* – Registry only. Per the Second Order, the Registry reclassified the document as confidential on 23 January 2014; (9) ICC-01/05-01/08-2441-Conf-Anx6 (“Document 2441-Conf-Anx6”), Annex 6 of Document 2441-Conf was initially classified as confidential *ex parte* – Registry only. On 31 January 2014, pursuant to the Second Order, the Registry provided a redacted version to the parties and participants, ICC-01/05-01/08-2441-Conf-Red-Anx6 (“Document 2441-Conf-Red-Anx6”). (10) Decision on the Registry’s observations on the prosecution’s request relating to Article 70 investigation, 03 December 2012, ICC-01/05-01/08-2461-Conf (“Decision 2461-Conf”), this decision was reclassified as confidential on 9 December 2013, pursuant to the First Order. (11) Victims and Witnesses Unit’s Complementary Information to the “Registry’s Observations relating to the ‘Decision requesting the Registry’s observations on the prosecution’s request relating to Article 70 investigation’ (ICC-01/05-01/08-2421-Conf-Exp)”, 3 December 2012, ICC-01/05-01/08-2462-Conf (“Document 2462-Conf”), This document was reclassified as confidential on 23 January 2014, pursuant to the Second Order, with

3. In the Defence Motion, the defence submits that the prosecution has adopted an approach of publicising the “purported outcome of its investigations” into allegations against Mr Bemba in the context of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wanda and Narcisse Arido*, ICC-01/05-01/13 (“case ICC-01/05-01/13”).⁶ The defence further submits that the prosecution’s “requests for assistance which detail the gaps in its investigations have consistently been filed confidentially” lead to “a one-sided picture being presented to the public”.⁷

4. The defence also notes that the Single Judge in case ICC-01/05-01/13 reclassified *ex parte* filings and confidential annexes as public,⁸ subsequently “there is now a wealth of information in the public domain concerning the alleged basis of the Prosecution’s case; the nature of the allegations against the five suspects; the requests for investigative assistance made by the Prosecution in attempting to build its Article 70

confidential Annex 1: (12) ICC-01/05-01/08-2462-Conf-Exp-Anx1 (“Document 2462-Conf-Anx1”), Annex 1 of Document 2462-Conf was initially classified as confidential *ex parte* -VWU and prosecution. On 31 January 2014, pursuant to the Second Order, the Registry provided a redacted version to the parties and participants, ICC-01/05-01/08-2462-Conf-Anx1-Red (“Document 2462-Conf-Anx1-Red”). (13) 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 (“Document 2548-Conf-Exp”), on 31 January 2014, pursuant to the Second Order, the prosecution filed a redacted version of the initial confidential *ex parte* document, ICC-01/05-01/08-2548-Conf-Red (“Document 2548-Conf-Red”). (14) Transcript of hearing on 9 April 2013, ICC-01/05-01/08-T-303-CONF-EXP-ENG (“Transcript T-303-Conf”), per the Second Order, the Registry provided a confidential redacted version of the transcript. In response to a defence motion, the Chamber issued its Decision on “Defence Motion for the lifting of redactions of the 9 April 2013 status conference transcript”, 21 March 2014, ICC-01/05-01/08-3021-Conf. In its decision, the Chamber, citing developments in case ICC-01/05-01/13, its duty pursuant to Article 68 of the Statute, and the Registrar’s responsibility pursuant to Regulation 90 of the Regulations, ordered the Registry to provide a lesser redacted version of Transcript T-303-Conf to the parties and participants. On 9 April 2014, in accordance with the Chamber’s instructions, the Registry filed ICC-01/05-01/08-T-303-CONF-Red2-ENG (“Transcript T-303-Conf-Red2”). (15) Decision on the prosecution’s request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Conf (“Decision 2606-Conf”), this document was reclassified as confidential per the First Order.

⁶ ICC-01/05-01/08-2978-Conf, paragraphs 22 to 25.

⁷ ICC-01/05-01/08-2978-Conf, paragraph 24.

⁸ ICC-01/05-01/08-2978-Conf, paragraph 26.

case; and the orders made by the Single Judge of Pre-Trial Chamber II in order to assist the Prosecution in its investigation”.⁹ The defence argues that this Chamber should adopt a similar approach as followed in ICC-01/05-01/13 in order to “redress the imbalance which exists in this case”¹⁰ and that there is no basis for maintaining the confidentiality of the filings in the *Bemba* case which concern the same issue.¹¹

5. Lastly, the defence submits that Transcript-T-303-Conf should be also reclassified as public,¹² since the information discussed in the status conference recorded in Transcript-T-303-Conf is now in the public domain. As such, the defence submits, “there can be no prejudice to any ongoing investigations, particularly given that the five suspects are now in custody”.¹³
6. On 18 February 2014, the Chamber ordered the prosecution, the Registry, and the Victims and Witnesses Unit (“VWU”) to submit their observations on the Defence Motion.¹⁴
7. On 10 March 2014, the prosecution filed its “Prosecution’s Observations on ICC-01/05-01/08-2978-Conf, ‘Defence Motion for the Reclassification of Documents,’ (“Prosecution Observations”),”¹⁵ in which it states that it does not object to the reclassification as public of a number of the filings

⁹ ICC-01/05-01/08-2978-Conf, paragraph 27.

¹⁰ ICC-01/05-01/08-2978-Conf, paragraph 25.

¹¹ ICC-01/05-01/08-2978-Conf, paragraph 29.

¹² ICC-01/05-01/08-2978-Conf, paragraph 31.

¹³ ICC-01/05-01/08-2978-Conf, paragraph 31.

¹⁴ Email from Chamber to parties, participants, the Registry, and the VWU on 18 February 2014 at 17.20.

¹⁵ Prosecution’s Observations on ICC-01/05-01/08-2978-Conf, “Defence Motion for Reclassification of Documents”, 10 March 2014, ICC-01/05-01/08-3006-Conf.

listed in the Defence Annex.¹⁶ However, the prosecution requested that the Chamber afford it the opportunity to propose additional redactions to the filings listed in the Defence Annex. The prosecution submits that any proposed redactions would apply to “the identity of protected witnesses, other persons of interest, and any other matter that may tend to compromise the investigation of the alleged Article 70 offences”.¹⁷

8. On 12 March 2014, the Registry filed its “Observations of the Registry on the Defence Motion for Reclassification of documents (ICC-01/05-01/08-2978-Conf)” (“Registry Observations”),¹⁸ together with four confidential *ex parte* annexes (“Registry Annexes”). In the Registry Observations, the Registry submits that since Documents 2412-Conf and 2548-Conf emanate from the prosecution, the prosecution is in a better position to assess whether the documents should be reclassified as public.¹⁹ The Registry also submits that Document 2462-Conf and Decisions 2421-Conf, 2461-Conf, 2920-Conf, and 2943-Conf, may be reclassified as public without redactions. However, the Registry notes that its views on these documents do not account for the prosecution’s potential proposals for redactions in relation to these documents.²⁰ The Registry further submits that Documents 2441-Conf, 2441-Conf-Anx3, and 2441-Conf-Anx5 may also be reclassified as public without redactions.²¹

¹⁶ ICC-01/05-01/08-3006-Conf, paragraph 1.

¹⁷ ICC-01/05-01/08-3006-Conf, paragraph 2.

¹⁸ Observations of the Registry on the Defence Motion for Reclassification of documents (ICC-01/05-01/08-2978-Conf, 12 March 2014, ICC-01/05-01/08-3012-Conf, with confidential *ex parte* Annexes 1 to 4.

¹⁹ ICC-01/05-01/08-3012-Conf, paragraphs 1, 6

²⁰ ICC-01/05-01/08-3012-Conf, paragraphs 2, 4, 5, 8, and 9.

²¹ ICC-01/05-01/08-3012-Conf, paragraph 3.

9. In addition, the Registry proposes that Documents 2441-Conf-Anx2, 2441-Conf-Anx4, 2441-Conf-Anx6, Decision 2606-Conf, and Transcript-T-303-Conf may be reclassified as public, with the certain redactions proposed in the Registry Annexes implemented.²² With relation to Decision 2606-Conf and Transcript T-303-Conf, the Registry notes that its views on these documents do not account for the prosecution's potential proposals regarding these documents.²³
10. Further, the Registry proposes that Documents 2441-Conf-Anx1-Red2 and 2462-Conf-Anx1-Red should remain confidential as the documents are only related to practices and procedures of the VWU.²⁴
11. On 14 March 2014, the Chamber granted the prosecution's request to propose additional redactions to the filings listed in the Defence Annex.²⁵ On 21 March 2014, the prosecution filed its "Prosecution's Request for Reclassification of 10 Documents as Public and for Application of Redactions" ("Prosecution Request"),²⁶ together with seven corresponding confidential annexes ("Prosecution Annexes").
12. In the Prosecution Request, the prosecution asks the Chamber to reclassify Documents 2412-Conf, 2441-Conf, 2441-Conf-Anx3, 2441-Conf-Anx5, 2462-Conf and Decisions 2421-Conf, 2461-Conf and 2943-Conf as public without redactions.²⁷ In addition, the prosecution requests that the

²² ICC-01/05-01/08-3012-Conf, paragraphs 4, 7 and 10.

²³ ICC-01/05-01/08-3012-Conf, paragraph 7.

²⁴ ICC-01/05-01/08-3012-Conf, paragraph 3 and 5; Registry Annex 4, ICC-01/05-01/08-3012-Conf-Exp-Anx4.

²⁵ Email from Chamber to parties, participants, the Registry, and the VWU, 14 March 2014 at 9.02.

²⁶ Prosecution's Request for Reclassification of 10 Documents as Public and for Application of Redactions, 21 March 2014, ICC-01/05-01/08-3022 with confidential Annexes 1 to 7.

²⁷ ICC-01/05-01/08-3022, paragraph 6.

Chamber reclassify Documents 2441-Conf-Anx2, 2441-Conf-Anx4, 2441-Conf-Red-Anx6, and 2548-Conf-Exp, Decision 2606-Conf,²⁸ Transcript T-303-Conf-Exp, and ICC-01/05-01/08-2943-Conf-Exp-Anx ("Document 2943-Conf-Exp-Anx") as public, with the proposed redactions it submits in its annexes applied.²⁹ Finally, the prosecution requests that Documents 2441-Conf-Anx1-Red2 and 2548-Conf-AnxA remain confidential.³⁰ According to the prosecution, applying the redactions necessary to protect confidential information in these two documents would render the documents "incomprehensible".³¹

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 64(2), (7), 67, and 68 of the Statute; Rule 81(2) of the Rules of the Rules of Procedure and Evidence ("Rules"); and Regulations 20, 23*bis*, and 90 of the Regulations of the Court ("Regulations").

14. At the outset, the Chamber notes that, in the Defence Annex, the defence requests that Document "ICC-01/05-01/08-2421-Conf-AnxA" be

²⁸ The Chamber observes that the prosecution requests both that Decision 2606-Conf be made public without redactions and for the document to be reclassified as public with redactions. *See* ICC-01/05-01/08-3022, paragraph 6, footnote 5 and 6. The Chamber notes that the prosecution submitted proposed redactions in relation to the reclassification of Decision 2606-Conf.

²⁹ ICC-01/05-01/08-3022, paragraph 6. The defence did not request the reclassification of Document 2943-Conf-Exp-Anx, an Annex to the Second Order, as public; however, the prosecution requests the document's reclassification as public in the Prosecution Request. ICC-01/05-01/08-3022, paragraph 6, footnote 6.

³⁰ ICC-01/05-01/08-3022, paragraphs 6 to 7. Although the defence does not request the reclassification of Document 2548-Conf-AnxA, the Prosecution does make a request in relation to this document in the Prosecution Request.

³¹ ICC-01/05-01/08-3022, paragraph 7.

reclassified as public.³² Noting that it did not include an annex with Decision 2421-Conf, the Chamber considers the defence's request for the reclassification of ICC-01/05-01/08-2421-Conf-AnxA moot.

15. As to the remaining documents, the Chamber notes the defence's detailed submissions on the importance of ensuring the publicity of the proceedings.³³ Whilst the Chamber has consistently recalled its duty to respect that principle, the Chamber is also cognisant of its responsibility to balance the need for publicity of the proceedings with its obligation to ensure the confidentiality of information in accordance with the Court's legal framework.

16. In light of the above, and the parties and participants' submissions, the Chamber considers that the previous justifications for the classification of Documents 2412-Conf, 2441-Conf, 2441-Conf-Anx3, 2441-Conf-Anx5, and 2462-Conf and Decisions 2421-Conf, 2461-Conf, 2920-Conf, and 2943-Conf as confidential no longer exist. As such, these documents shall be reclassified as public without redactions.

17. Regarding Documents 2441-Conf-Anx2, 2441-Conf-Anx4, 2441-Conf-Anx6, 2943-Conf-Exp-Anx and 2548-Conf and Transcript-T-303-Conf, the Chamber considers that certain redactions remain necessary. In view of the Chamber's obligation to ensure confidentiality of information in accordance with the Court's legal framework, these redactions shall be limited to: (i) the identity and contact information of victims, witnesses, ICC personnel and other persons currently or formerly participating in the

³² ICC-01/05-01/08-2978-Conf-AnxA, paragraph 2.

³³ ICC-01/05-01/08-2978-Conf, paragraphs 11 to 20.

proceedings, (ii) information related to the safety, physical and psychological well-being, dignity and privacy of all victims and witnesses, (iii) financial details or other information that could lead to identifying witnesses or the working practices and security measures employed by organs of the Court to perform their duties vis-à-vis witnesses, and (iv) information related to the Registry's management of the detention centre and the operating procedures and systems of the Registry.

18. The Chamber notes certain discrepancies in the proposals for redactions submitted by the prosecution and the Registry. The Chamber directs the prosecution and the Registry to liaise and coordinate on the implementation of redactions consistent with the Chamber's direction in paragraph 17 *supra*.

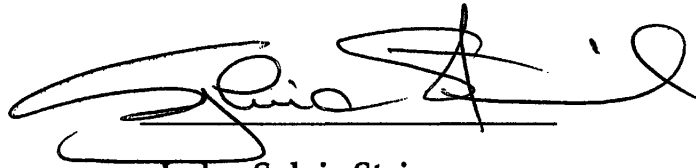
19. With regard to Decision 2606-Conf, and in line with its instruction in paragraph 17 *supra*, the Chamber considers that the document may be reclassified as public with the redactions proposed in the Registry and Prosecution Annexes applied.

20. Lastly, the Chamber finds that most of the information contained in Documents 2441-Conf-Anx1, 2462-Conf-Anx1 and 2548-Conf-AnxA is confidential. The Chamber further considers that the application of the necessary redactions, pursuant to the Chamber's obligations under Article 68 of the Statute and consistent with the Chamber's approach on redactions set forth in paragraph 17 *supra*, would render the documents incomprehensible. As such, the Chamber finds that these documents shall remain confidential at this stage.

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

- a. PARTIALLY GRANTS the Defence Motion for reclassification of documents as public, together with the necessary redactions;
- b. DECIDES that Documents 2441-Conf-Anx1, 2548-Conf-AnxA, and 2462-Conf-Anx1 shall remain confidential at this stage;
- c. GRANTS the Prosecution Request that Document 2943-Conf-Exp-Anx be reclassified as public, and AUTHORISES redactions to the document in line with the proposals in the Prosecution Annex;
- d. ORDERS the reclassification of Documents 2412-Conf, 2441-Conf, 2441-Conf-Anx3, 2441-Conf-Anx5, and 2462-Conf and Decisions 2421-Conf, 2461-Conf, 2920-Conf, and 2943-Conf as public;
- e. ORDERS the reclassification of Decision 2606-Conf as public by 16 May 2014, with the redactions proposed in the Registry and Prosecution Annexes applied.
- f. ORDERS the Registry and the prosecution to liaise and coordinate on the redactions to be applied to Documents 2441-Conf-Anx2, 2441-Conf-Anx4, 2441-Conf-Anx6, and 2548-Conf and Transcript-T-303-Conf, consistent with the Chamber's instructions in paragraph 17 *supra*, and to file redacted versions of these documents by 16 May 2014;
- g. ORDERS the parties and participants to file public redacted versions of the Defence Motion, the Prosecution Observations, and the Registry Observations by 16 May 2014, or to immediately inform the Chamber whether these documents may be reclassified as public without redactions.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 1 May 2014

At The Hague, The Netherlands