

**Cour
Pénale
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**International
Criminal
Court**

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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 requests for further disclosure

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Section**

**Other
Trial Chamber VII**

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 requests for further disclosure (“Decision”).

I. Background

1. On 6 July 2015, the Defence filed its “Further Defence Request for Disclosure” (“First Request”).¹
2. On 28 July 2015, the Prosecution filed its “Prosecution’s Response to ‘Further Defence Request for Disclosure’” (“First Request Response”),² in which it requests that the Chamber reject the First Request.³
3. On 10 August 2015, with leave of the Chamber,⁴ the Defence filed its “Defence Reply to the ‘Prosecution’s Response to ‘Further Defence Request for Disclosure’” (“First Request Reply”).⁵
4. On 20 November 2015, the Defence filed the “Defence Request for Disclosure of Further Material” (“Second Request”).⁶

¹ Further Defence Request for Disclosure, 6 July 2015, ICC-01/05-01/08-3264-Conf-Exp with confidential *ex parte* annexes A, B, and C. A public redacted version was filed on the same day: ICC-01/05-01/08-3264-Red2. A confidential redacted version was filed on 7 July 2015: ICC-01/05-01/08-3264-Conf-Red.

² Prosecution’s Response to “Further Defence Request for Disclosure”, 28 July 2015, ICC-01/05-01/08-3275-Conf-Exp. A confidential redacted version was filed on 7 August 2015: ICC-01/05-01/08-3275-Conf-Red.

³ ICC-01/05-01/08-3275-Red, paras 1 and 25.

⁴ The Defence filed its Defence Request for Leave to Reply to the “Prosecution’s Response to ‘Further Defence Request for Disclosure’”, 31 July 2015, ICC-01/05-01/08-3276-Conf-Exp with confidential *ex parte* Annexes A and B. A public redacted version was filed on the same day: ICC-01/05-01/08-3276-Red. The Chamber granted leave to reply in Decision on “Defence Request for Leave to Reply to the ‘Prosecution’s Response to ‘Further Defence Request for Disclosure’”, 6 August 2015, ICC-01/05-01/08-3279.

⁵ Defence Reply to the “Prosecution’s Response to ‘Further Defence Request for Disclosure’”, 10 August 2015, ICC-01/05-01/08-3280-Conf-Exp. A public redacted version was filed on the same day: ICC-01/05-01/08-3280-Red.

5. On 14 December 2015, the Prosecution filed its "Prosecution's Response to 'Defence Request for disclosure of further material'" ("Second Request Response") along with a confidential, *ex parte* annex.⁷
6. On 22 December 2015, with leave of the Chamber,⁸ the Defence filed its "Defence Reply to the 'Prosecution's Response to 'Defence request for disclosure of further material''" ("Second Request Reply").⁹
7. On 12 January 2016, the Prosecution filed an addendum to its "Prosecution's Response to 'Defence Request for disclosure of further material'" ("Prosecution Addendum").¹⁰

II. Applicable law

8. For the purposes of the present Decision, the Chamber has considered Articles 54(3), 64(2) and (6)(c), 67(1)(b) and (2), and 68(1) and (5) of the Rome Statute ("Statute"), Rules 77, 81(1), (2), and (3) of the Rules of Procedure and Evidence ("Rules"), and Regulation 20 of the Regulations of the Court.

⁶ Defence request for disclosure of further material, 20 November 2015, ICC-01/05-01/08-3305-Conf. A public redacted version was filed on 12 January 2016: ICC-01/05-01/08-3305-Red.

⁷ Prosecution's Response to "Defence Request for disclosure of further material", 14 December 2015, ICC-01/05-01/08-3307-Conf, with confidential *ex parte* annex A. A public redacted version was filed on 17 December 2015: ICC-01/05-01/08-3307-Red.

⁸ The Defence filed its Defence Request to for Leave to Reply to the 'Prosecution's Response to "Defence request for disclosure of further material"', 18 December 2015, ICC-01/05-01/08-3308-Conf. A public redacted version was filed on 12 January 2016: ICC-01/05-01/08-3308-Conf. The Chamber granted leave to reply in its Decision on "Defence Request for Leave to Reply to the 'Prosecution's Response to "Defence request for disclosure of further material''", 22 December 2015, ICC-01/05-01/08-3309-Conf.

⁹ Defence Reply to the 'Prosecution's Response to "Defence request for disclosure of further material"', 4 January 2016, ICC-01/05-01/08-3310-Conf. A public redacted version was filed on 11 January 2016: ICC-01/05-01/08-3310-Red.

¹⁰ Addendum to "Prosecution's Response to 'Defence Request for disclosure of further material'", 12 January 2016, ICC-01/05-01/08-3313-Conf. A public redacted version was filed on 13 January 2016: ICC-01/05-01/08-3313-Red.

9. Regarding the application of Rule 77,¹¹ the Chamber reiterates the Appeals Chamber's position that the term "material to the preparation of the defence" must be interpreted broadly and "should be understood as referring to all objects that are *relevant* for the preparation of the defence", including documents that are not directly linked to exonerating or incriminating evidence.¹² The Chamber further recalls that an item will be considered material to the preparation of the defence if it would "undermine the prosecution case or support a line of argument of the defence" or "significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case".¹³

10. The Chamber also notes the position of Trial Chamber I that:¹⁴

information [...] that is relevant and concerns defence witnesses who are to be called, is to be disclosed to the defence for preparation, not least because it will enable the accused to decide whether or not to call them. Therefore, information that undermines or supports the evidence, or the credibility, of proposed defence witnesses falls within the scope of Rule 77 of the Rules. This is likely to assist trial efficiency, because it will increase the likelihood that only those witnesses are called who are, on an examination of all the relevant material, credible

¹¹ Rule 77 of the Rules provides: "The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person."

¹² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paras 77 to 78 (emphasis added); *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 38; *The Prosecutor v. Jean-Pierre Bembo Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses, 24 August 2015, ICC-01/05-01/13-1172, para. 17; and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Disclosure of Information related to Prosecution Intermediaries, 4 September 2013, ICC-01/09-01/11-904, para. 27.

¹³ Decision on the "Defence Motion on Prosecution contact with its witnesses", 22 May 2014, ICC-01/05-01/08-3070, para. 23, quoting *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, para. 16.

¹⁴ ICC-01/04-01/06-2624, para. 18.

and reliable. The prosecution is not obliged to disclose its theories or its tactics, but instead it must provide all relevant information and material as regards the defence witnesses.

11. The Chamber also notes the finding of the Appeals Chamber that:¹⁵

[w]here appropriate, in deciding whether the information sought continues to be material to the preparation of the defence, the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor. However, caution should be exercised in taking such an approach as it must not undermine the paramount right of the defence to disclosure of all information material to the preparation of the defence.

12. In addition, the Chamber recalls its approach to the disclosure of “interview notes”.¹⁶ In general terms, “interview notes” fall within the scope of Rule 81(1) of the Rules;¹⁷ however, the Chamber has held that such notes may be disclosable and that the Prosecution is required to make fact-specific decisions for each such item to determine whether it is disclosable pursuant to Rule 77 or Article 67(2).¹⁸ In making this assessment, the Chamber held that:¹⁹

critically the prosecution must ensure that if there has been a later formal statement, all the exculpatory material in the screening notes has been disclosed within the statement, along with any information that is material to defence preparation. If this had not occurred, the prosecution must disclose the screening notes, or the relevant information.

13. The Chamber also recalls that it ordered the Prosecution to disclose items related to a witness *after* the completion of that witness’s oral testimony,²⁰

¹⁵ ICC-02/05-03/09-501, para. 40 (internal citations omitted).

¹⁶ ICC-01/05-01/08-3070, para. 25.

¹⁷ Rule 81(1) of the Rules provides: “Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure”.

¹⁸ Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-Conf, para. 33. A public redacted version was filed on the same day: ICC-01/05-01/08-750-Red.

¹⁹ ICC-01/05-01/08-750-Red, para. 33.

²⁰ ICC-01/05-01/08-3070, para. 23; and Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 12 July 2011, ICC-01/05-01/08-1594-Conf, para. 27. A public redacted version was filed on 29 July 2011: ICC-01/05-01/08-1594-Red.

and that the Prosecution's disclosure obligations "do[...] not end at the close of evidence but continue[...] until the conclusion of the trial".²¹

14. Lastly, the Chamber notes that under Rule 77 the Prosecution holds primary responsibility for determining whether to disclose material or not, with the Chamber's role limited to resolving instances of "doubt".²²

III. Submissions and Analysis

First Request

Submissions

15. In its First Request, the Defence requests that the Chamber order that the Prosecution: (i) disclose all material in its possession relevant to the credibility of Defence witnesses in the *Bemba* case;²³ (ii) disclose the interview records of P261, a witness 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") who, based on information obtained from case ICC-01/05-01/13, the Defence argues was also a Defence witness in the *Bemba* case;²⁴ and (iii) disclose all materials generated during contact with Defence witnesses falling within the terms of the Chamber's Decision on the "Defence Motion on Prosecution contact with its witnesses" ("Decision 3070"),²⁵ including but not limited to items generated during contact with D2 and D3 in April 2014, and including

²¹ Decision on defence requests for disclosure, 2 July 2014, ICC-01/05-01/08-3100, para. 24.

²² ICC-01/05-01/08-750-Red, para. 30.

²³ ICC-01/05-01/08-3264-Conf-Exp, para. 25.

²⁴ ICC-01/05-01/08-3264-Conf-Exp, paras 6 to 11, and 25. *See also* ICC-01/05-01/08-3280-Red, paras 9 to 12.

²⁵ ICC-01/05-01/08-3070.

materials other than interview records,²⁶ and/or, if it asserts that no audio/video material exists, explain why Defence witnesses were questioned as suspects without being afforded their statutory rights.²⁷

16. The Defence submits that, in its investigations in case ICC-01/05-01/13, the Prosecution has contacted and interviewed numerous Defence witnesses and, while disclosing some, has failed to disclose much of the material generated in these contacts, which it argues goes to the credibility of Defence witnesses in the *Bemba* case and is thus disclosable under Rule 77.²⁸

17. As a specific example, the Defence submits that the interview records of Prosecution witness P261 in case ICC-01/05-01/13, who it argues was also a witness in the *Bemba* case,²⁹ were disclosable in the *Bemba* case pursuant to Rule 77 immediately upon their creation.³⁰ It notes that it requested disclosure of these records, but that the Prosecution declined to disclose the material on the basis that “delayed disclosure may possibly be ordered” in case ICC-01/05-01/13.³¹ The Defence argues that the Prosecution’s approach is “misconceived”.³²

18. As another example, the Defence notes that interview records for D2 and D3 were disclosed in the *Bemba* case in June 2015, as part of a “growing list of post-testimony interviews with Defence witnesses”, despite the interviews having been conducted in April 2014, with no explanation of

²⁶ ICC-01/05-01/08-3264-Conf-Exp, para. 25.

²⁷ ICC-01/05-01/08-3264-Conf-Exp, paras 15 to 19 and 25. *See also*, ICC-01/05-01/08-3280-Red, paras 4 to 8.

²⁸ ICC-01/05-01/08-3264-Red2, paras 1 to 2, and 4 to 5.

²⁹ ICC-01/05-01/08-3264-Conf-Exp, paras 6 and 8.

³⁰ ICC-01/05-01/08-3264-Conf-Exp, paras 6 to 9.

³¹ ICC-01/05-01/08-3264-Conf-Exp, paras 10 to 11 (emphasis omitted).

³² ICC-01/05-01/08-3264-Red2, para. 12.

the delay.³³ Further, the Defence argues that although the Prosecution has disclosed a “significant number of interview records”, it has yet to disclose other material, for example, audio and video recordings of, among others, the interviews of D2 and D3, which it asserts must exist.³⁴ It further submits that the interview records that have been disclosed reveal other contacts between the Prosecution and Defence witnesses in relation to which nothing has been disclosed.³⁵ In addition, the Defence submits that the Prosecution’s view of its disclosure obligations is “erroneously narrow” and that this is borne out by examples, noting two interview records of P31 and D15 disclosed in case ICC-01/05-01/13, but not in the *Bemba* case.³⁶

19. Lastly, the Defence submits that it is seeking disclosure to avoid concrete repercussions that would arise if the Prosecution’s contact with witnesses from the *Bemba* case continues to be hidden from the Defence.³⁷ It asserts a right to material relevant to the credibility of its witnesses and states it is required to intervene in case ICC-01/05-01/13 to protect Mr Bemba’s rights in the *Bemba* case if necessary, which would be precluded without full and proper disclosure.³⁸

20. In its First Request Response, the Prosecution submits that the First Request is an attempt to circumvent the orders of Trial Chamber VII regarding delayed disclosure of the identity and interview records of P261 in case ICC-01/05-01/13 pending implementation of protective

³³ ICC-01/05-01/08-3264-Conf-Exp, paras 13 to 14.

³⁴ ICC-01/05-01/08-3264-Conf-Exp, paras 15 to 18.

³⁵ ICC-01/05-01/08-3264-Red2, paras 19 to 20.

³⁶ ICC-01/05-01/08-3264-Conf-Exp, para. 21.

³⁷ ICC-01/05-01/08-3264-Red2, paras 22 to 23.

³⁸ ICC-01/05-01/08-3264-Red2, paras 22 to 23.

measures by the Victims and Witnesses Unit.³⁹ It submits that disclosing the interview records before Trial Chamber VII's orders are fully complied with would violate those orders, and argues that the Defence fails to explain why, in such circumstances, the Chamber in the *Bemba* case should be engaged when the Defence will have the records in "a matter of days".⁴⁰ Further, by reference to prior decisions of the Chamber, the Prosecution asserts that the Chamber in the *Bemba* case has "accorded priority to Pre-Trial Chamber II" on matters relating to redactions and witness protection.⁴¹

21. As to audio recordings of interviews, the Prosecution submits that the content of the transcripts is duplicative of such material and that as such the audio recordings were not disclosed absent any dispute as to the quality of the transcription or the interview process;⁴² however, it states that it would not oppose their inspection if the Defence articulated a basis for such review, except to the extent they may require redaction.⁴³
22. Regarding the material related to D2 and D3, the Prosecution submits that it disclosed 19 documents on 18 July 2014, but "inadvertently omitted" to disclose two documents, which it then disclosed on 22 June 2015.⁴⁴ In addition, it submits that the 19 documents disclosed contained sufficient information about D2 and D3.⁴⁵
23. Lastly, regarding the non-disclosure of investigator's notes regarding P31 and D15, the Prosecution submits that not all such notes are disclosable

³⁹ ICC-01/05-01/08-3275-Conf-Exp, paras 4 to 7.

⁴⁰ ICC-01/05-01/08-3275-Conf-Red, paras 7 and 9.

⁴¹ ICC-01/05-01/08-3275-Conf-Red, para. 10.

⁴² ICC-01/05-01/08-3275-Conf-Red, para. 14.

⁴³ ICC-01/05-01/08-3275-Conf-Red, para. 14.

⁴⁴ ICC-01/05-01/08-3275-Conf-Red, para. 12.

⁴⁵ ICC-01/05-01/08-3275-Conf-Red, para. 13.

and the Prosecution must make a fact-specific assessment, taking into account whether any material information in the notes is already included in disclosed statements, to determine whether a note is disclosable.⁴⁶

24. In its First Request Reply, the Defence submits that the Prosecution, rather than disclosing material generated in the course of contacts with Defence witnesses, “continue[s] to pick and choose which contacts it thinks it is required to disclose”.⁴⁷ It argues that contact between the Prosecution and Defence witnesses is disclosable by its existence, and that the “‘forensic purpose’ test” used by the Prosecution relates to seeking material from another case, not disclosure.⁴⁸

25. The Defence submits that the Prosecution argument that audio recordings are duplicative of transcripts and only disclosable where there is a dispute as to, for example, the quality of the transcription, is “absurd”, noting that no such argument could be advanced without prior disclosure of the audio recordings.⁴⁹

26. More broadly, the Defence argues that the Prosecution approach to disclosure has prevented the Chamber from fulfilling its role as “final arbiter of whether material should be disclosed to the Defence, or assessing the impact of non-disclosure on the fairness of the proceedings”.⁵⁰ It submits that, as witness P261 in case ICC-01/05-01/13 was in fact also a Defence witness in the *Bemba* case, the Prosecution was obliged to seek authorisation from Trial Chamber III to delay disclosure

⁴⁶ ICC-01/05-01/08-3275-Conf-Red, paras 16 to 17.

⁴⁷ ICC-01/05-01/08-3280-Red, paras 1 to 5 (emphasis omitted).

⁴⁸ ICC-01/05-01/08-3280-Red, paras 5 to 6.

⁴⁹ ICC-01/05-01/08-3280-Red, para. 8.

⁵⁰ ICC-01/05-01/08-3280-Red, paras 9 to 11, and 15.

of his interviews in the *Bemba* case.⁵¹ It submits, referring to alleged concrete consequences in the *Bemba* case of the non-disclosure of statements of Defence witnesses, that the Prosecution cannot “ringfence these issues before a different Chamber” and that as such non-disclosure falls squarely within the purview of Trial Chamber III.⁵²

27. Finally, the Defence submits that only Trial Chamber III “possesses a detailed understanding of the facts and circumstances of the [*Bemba* case], and only [Trial Chamber III] can determine whether delayed disclosure is or was warranted in these proceedings” and that Trial Chamber VII is “‘realistically unable’ to do so”.⁵³

Analysis

28. As a preliminary issue, the Chamber will address certain disclosures which occurred after the filing of the First Request and which have a bearing thereon and the necessity of orders for further disclosure.

29. Following the filing of the First Request, the Prosecution disclosed material pursuant to Rule 77 on 16 and 31 July 2015,⁵⁴ comprised of numerous transcripts of interviews with Defence witnesses from the *Bemba* case taken in the context of investigations for case ICC-01/05-01/13, created mainly between February 2014 and March 2015. The Chamber notes that the interview records of P31 and D15, identified as undisclosed

⁵¹ ICC-01/05-01/08-3280-Conf-Exp, para. 12.

⁵² ICC-01/05-01/08-3280-Red, paras 13 to 15.

⁵³ ICC-01/05-01/08-3280-Red, paras 16 to 18.

⁵⁴ Prosecution’s Communication of Evidence disclosed to the Defence on 16 July 2015 pursuant to Rule 77 of the Rules of Procedure and Evidence, 16 July 2015, ICC-01/05-01/08-3269, with confidential annex A; and Prosecution’s Communication of Evidence disclosed to the Defence on 31 July 2015 pursuant to Rule 77 of the Rules of Procedure and Evidence, 31 July 2015, ICC-01/05-01/08-3278, with confidential annex A.

by the Defence in its First Request,⁵⁵ were disclosed on 16 July 2015,⁵⁶ and the interview records of P261, similarly identified as undisclosed by the Defence, were disclosed on 31 July 2015.⁵⁷ As such, the specific issue of disclosure of these materials is now moot.

30. Thereafter, in its First Request Reply, in light of the material disclosed since it filed its First Request, the Defence modifies its complaint regarding the interview records of P261, complaining specifically of the late disclosure of “some” interview records.⁵⁸ However, it provides no explanation or basis for its assertion that the Prosecution provided only “some” interview records. As such, the Chamber finds the request for disclosure of P261’s interview records moot, and the Defence’s submission that only “some” were disclosed speculative.

31. Noting that the question of disclosure of the specific materials identified by the Defence as undisclosed is moot,⁵⁹ the Chamber will now determine whether orders for further disclosure are necessary.

32. Putting aside the interview records of P261 addressed above, the Defence requests disclosure of the following material: (i) all material in the Prosecution’s possession relevant to the credibility of Defence witnesses in the *Bemba* case; and (ii) all materials generated during contact between the Prosecution and Defence witnesses falling within the terms of Decision 3070, including materials other than interview records.⁶⁰

⁵⁵ ICC-01/05-01/08-3264-Conf, para. 21.

⁵⁶ ICC-01/05-01/08-3269-Conf-AnxA.

⁵⁷ ICC-01/05-01/08-3278-Conf-AnxA.

⁵⁸ ICC-01/05-01/08-3280-Conf-Exp, paras 11 to 12.

⁵⁹ See para 29.

⁶⁰ ICC-01/05-01/08-3264-Conf-Exp, 15 to 19, and 25; and ICC-01/05-01/08-3280-Red, paras 4 to 8.

33. Regarding audio or video recordings of interviews between the Prosecution and Defence witnesses, the Chamber notes the Prosecution's submission that the content of such recordings is duplicative of the transcripts of interviews.⁶¹ Further, noting that the Defence has been in possession of the transcripts of such interviews since 22 July 2014⁶² — yet has made no submissions or requests based thereon — absent specific substantiation as to why the additional disclosure of audio or video recordings of such interviews is necessary, the Chamber finds that the Defence has failed to establish such items' materiality.⁶³

34. The Chamber notes the Prosecution's submission that not all materials generated in contacts with witnesses or other persons are disclosable,⁶⁴ and that certain contacts with D2 and D3 identified by the Defence do not contain information relevant to the *Bemba* case, as such contacts concerned scheduling meetings.⁶⁵ Generally, the Prosecution holds responsibility for making such determinations. Noting the Prosecution's explanation of the materials' content, the Chamber finds no reason to order their disclosure.

35. With respect to the disclosure of materials allegedly covered by Decision 3070, the Chamber notes that, in Decision 3070, the Chamber instructed the Prosecution to permit the defence to inspect interview notes, statements, or transcripts of interviews generated during the course of any contact between the Prosecution and the witnesses called by the defence in the *Bemba* case, subject to the restrictions on disclosure

⁶¹ ICC-01/05-01/08-3275-Conf-Red, para. 14.

⁶² See Prosecution's Communication of Rule 77 Evidence, 22 July 2014, ICC-01/05-01/08-3108, with confidential annex A.

⁶³ See ICC-02/05-03/09-501, para. 40.

⁶⁴ ICC-01/05-01/08-3275-Conf-Red, para. 15.

⁶⁵ ICC-01/05-01/08-3275-Conf-Red, para. 15.

provided for in the Statute and Rules 81 and 82 of the Rules.⁶⁶ However, the categories of materials set out by the Defence in its email request to the Prosecution – “interview notes, statements, transcripts of interviews, audio and/or visual recordings of interviews, notes of telephone conversations, investigative notes to file, receipts, email correspondence and other related material” – go beyond the scope of Decision 3070. As such, the Chamber finds the Defence’s request goes beyond the scope of the Chamber's order in Decision 3070.

36. In addition to the above, regarding the request that the Chamber order “the Prosecution, should it assert that no audio or video recordings of interviews with Defence witnesses are in existence, to explain why Defence witnesses were questioned as suspects without being afforded their statutory rights”,⁶⁷ the Chamber finds that this request falls outside the competence of this Chamber.

37. In light of the above, the Chamber finds that on the basis of the submissions made in the First Request, no orders for further disclosure are required.

Second Request

Submissions

38. In its Second Request, the Defence requests that the Chamber order the Prosecution to disclose: (i) certain material it identifies that was disclosed in case ICC-01/05-01/13, including material relating to the Prosecution’s procurement of financial records; (ii) an un-redacted version of CAR-

⁶⁶ ICC-01/05-01/08-3070, paras 19 and 27.

⁶⁷ ICC-01/05-01/08-3264-Conf-Exp, para. 25.

OTP-0089-1332-R01 – a contact log of the Prosecution’s contact with D55, which the Defence alleges shows Prosecution contact with D55 on three separate occasions before the close of the Defence case – (“OTP Contact Log”); (iii) material relating to the Prosecution’s contact with D55; and (iv) all Requests for Assistance (“RFAs”) concerning Defence witnesses or team members.⁶⁸

39. The Defence submits that the Prosecution, in fulfilling its disclosure obligations in case ICC-01/05-01/13, has revealed material that should have been disclosed to the Defence in the *Bemba* case.⁶⁹ It argues that the Prosecution’s disclosure in case ICC-01/05-01/13 does not eliminate the disclosure obligations arising in the *Bemba* case.⁷⁰ Additionally, the Defence claims that the “accused is entitled to have the prejudice which arises in the [*Bemba* case] from the Prosecution’s non-disclosure of the material acknowledged by the [*Bemba* case] Trial Chamber”.⁷¹

40. After receiving a redacted version of the OTP Contact Log through disclosure in case ICC-01/05-01/13, the Defence requests the Chamber to order the Prosecution to disclose an unredacted version of the OTP Contact Log in the *Bemba* case.⁷² Further, the Defence avers that it suffered “concrete prejudice” by calling a witness without having access to the prior records of contact between that witness and the Prosecution and by being denied the opportunity to challenge the Prosecution’s previous submissions to the Chamber as untrue.⁷³ Specifically, the Defence argues

⁶⁸ ICC-01/05-01/08-3305-Red, paras 3 and 47.

⁶⁹ ICC-01/05-01/08-3305-Red, paras 1 to 3.

⁷⁰ ICC-01/05-01/08-3305-Red, paras 4 and 9.

⁷¹ ICC-01/05-01/08-3305-Red, para. 5.

⁷² ICC-01/05-01/08-3305-Red, paras 13 to 18, and 22 to 23.

⁷³ ICC-01/05-01/08-3305-Red, paras 19 to 21.

that the Prosecution had contact with D55 on 7 June 2013, before the Defence closed its case on 14 November 2013.⁷⁴

41. The Defence submits that documents related to RFAs made to at least nine different states concerning members of the Defence team and the credibility of Defence witnesses are disclosable in the *Bemba* case.⁷⁵ The Defence argues that their non-disclosure caused concrete prejudice to the Defence in the *Bemba* case.⁷⁶

42. Lastly, the Defence discusses documents obtained from Western Union and Austrian authorities – disclosed in case ICC-01/05-01/13 – regarding the financial records of Defence witnesses and members of the Defence team which it submits are relevant to the Defence in the *Bemba* case.⁷⁷ The Defence argues that the non-disclosure caused significant prejudice, claiming that had the documents been previously disclosed, the Defence “would have been in a position to address these issues with the Defence witnesses at the time of their appearance”.⁷⁸

43. In its Second Request Response, the Prosecution requests that the Chamber reject the Second Request in its entirety and argues that the Defence has failed to establish the requested materials’ *prima facie* materiality to its preparation.⁷⁹ Regarding the OTP Contact Log, the Prosecution requests that the Chamber assess and declare the unredacted document as not material to the Defence’s preparation in the *Bemba* case.⁸⁰ It submits that the Defence has access to the information through case

⁷⁴ ICC-01/05-01/08-3305-Red. para. 21.

⁷⁵ ICC-01/05-01/08-3305-Red, paras 24 to 26, 33, and 42 to 45.

⁷⁶ ICC-01/05-01/08-3305-Red, paras 27 to 32.

⁷⁷ ICC-01/05-01/08-3305-Red, paras 34 to 38.

⁷⁸ ICC-01/05-01/08-3305-Red, paras 39 to 41.

⁷⁹ ICC-01/05-01/08-3307-Red, paras 2, 10 to 11, and 39.

⁸⁰ ICC-01/05-01/08-3307-Red, para. 39.

ICC-01/05-01/13 and that the Defence is thus entitled to rely on it without formal disclosure in the *Bemba* case.⁸¹ Further, the Prosecution argues that the Second Request is “vague, general and unsubstantiated” and an attempt to re-litigate previously rejected requests.⁸²

44. Regarding disclosure of an unredacted version of the OTP Contact Log, the Prosecution argues that the Defence failed to provide a reason or justification for the disclosure of the document.⁸³ Additionally, the Prosecution argues that the document does not contain any information material to the Defence under Rule 77.⁸⁴ The Prosecution opposes disclosure of the unredacted version, because it would “render [...] witness protective measures futile”.⁸⁵ Further, the Prosecution submits that the Defence’s request for disclosure of any other material generated out of the Prosecution’s contacts with D55 is “vague, general and unsubstantiated”.⁸⁶

45. The Prosecution opposes the disclosure of RFAs as the information contained therein is “not *prima facie* material to defence preparation”.⁸⁷ Instead, the Prosecution submits that the Chamber must assess the materiality of the RFAs on a “case-by-case basis” and that the defence has failed to establish a basis for their disclosure.⁸⁸ Additionally, the Prosecution submits that the Defence’s allegations as to the prejudice caused by the non-disclosure of the RFAs are an attempt to re-litigate

⁸¹ ICC-01/05-01/08-3307-Red, paras 2 and 13.

⁸² ICC-01/05-01/08-3307-Red, para. 3.

⁸³ ICC-01/05-01/08-3307-Red, para. 14.

⁸⁴ ICC-01/05-01/08-3307-Red, para. 16.

⁸⁵ ICC-01/05-01/08-3307-Red, para. 20.

⁸⁶ ICC-01/05-01/08-3307-Red, para. 22.

⁸⁷ ICC-01/05-01/08-3307-Red, para. 23.

⁸⁸ ICC-01/05-01/08-3307-Red, paras 23 and 28.

matters already adjudicated by the Chamber.⁸⁹ Further, the Prosecution argues that its conduct related to the RFAs did not violate the immunity of the Defence, professional privilege, or endanger the safety or security of any witness or third party.⁹⁰

46. Finally, the Prosecution contends that the Defence's submissions on financial records are "unsubstantiated" and fail to establish the materiality of the records to the *Bemba* case.⁹¹ Regarding the Defence's allegation of having suffered prejudice as a result of the records' non-disclosure, the Prosecution submits that the Chamber has already ruled that no prejudice was caused by the non-disclosure and that the Prosecution did not use or rely on the financial records in the *Bemba* case.⁹²

47. In its Second Request Reply, the Defence argues that the "Prosecution is refusing to disclose documents" material to its preparation on the justification that the Defence already has access to the documents in question and is entitled to rely on them without formal disclosure.⁹³ The Defence alleges that the Prosecution has an ongoing duty to disclose all materials to determine whether they are disclosable in the *Bemba* case specifically.⁹⁴ Further it argues that the Prosecution's approach does not accord with the disclosure regime in the *Bemba* case or the jurisprudence of other chambers, and constitutes "a transparent attempt to avoid

⁸⁹ ICC-01/05-01/08-3307-Red, paras 25 and 29.

⁹⁰ ICC-01/05-01/08-3307-Red, paras 26 to 27.

⁹¹ ICC-01/05-01/08-3307-Red, paras 30 to 35.

⁹² ICC-01/05-01/08-3307-Red, paras 36 to 38.

⁹³ ICC-01/05-01/08-3310-Red, para. 1.

⁹⁴ ICC-01/05-01/08-3310-Red, para. 2.

disclosure, and deprive the accused of his right to a remedy in the present proceedings".⁹⁵

48. Regarding the disclosure of materials originating from the Prosecution's contact with D55, the Defence asserts that the previously disclosed CAR-OTP-0056-0315 is actually a statement given by P213.⁹⁶ Further, the Defence avers that the Prosecution's submission that it has disclosed the relevant materials in the context of the *Bemba* case "appears to be a deliberate attempt to mislead" the Chamber, and should be viewed in light of the "history of the Prosecution's misrepresentations and wholly inconsistent statements over the course of the present proceedings", listing several alleged misrepresentations.⁹⁷ Regarding the OTP Contact Log, the Defence argues that the redactions were applied directly by the Prosecution and therefore the Chamber can lift the redactions.⁹⁸

49. In its Prosecution Addendum, the Prosecution clarifies that one of three documents it cited in support of its contention that it had fulfilled its disclosure obligations with respect to D55 in the *Bemba* case was erroneously cited, and in fact a statement of P213.⁹⁹

Analysis

50. At the outset, the Chamber clarifies that the Prosecution's Rule 77 disclosure obligations in the *Bemba* case and case ICC-01/05-01/13 exist separately. While the Defence's access to documents disclosed in case ICC-01/05-01/13 may be relevant in assessing whether *prejudice* is caused

⁹⁵ ICC-01/05-01/08-3310-Red, para. 3.

⁹⁶ ICC-01/05-01/08-3310-Red, para. 4.

⁹⁷ ICC-01/05-01/08-3310-Red, para. 5.

⁹⁸ ICC-01/05-01/08-3310-Red, para. 7.

⁹⁹ ICC-01/05-01/08-3313-Conf, para 1(a).

in cases of late or non-disclosure of material in the *Bemba* case,¹⁰⁰ disclosure in case ICC-01/05-01/13 does not affect or discharge the Prosecution's obligation to disclose any material falling within the scope of Rule 77 in the *Bemba* case.

51. Turning to the specific material identified in the Second Request, the Chamber notes that the OTP Contact Log is not expressly covered by the Chamber's previous order concerning "*interview notes, statements, or transcripts of interviews* [...]" generated during the course of any contact between the prosecution and the witnesses called by the defence in the *Bemba* case".¹⁰¹ Therefore, in line with normal practice,¹⁰² it was for the Prosecution to determine whether the document was disclosable under Rule 77. However, in light of the disagreement between the Defence and Prosecution as to whether the document is material to the preparation of the Defence, the Chamber is now called upon to make its own assessment of whether the OTP Contact Log should be disclosed to the Defence.

52. The Chamber notes that two of the three alleged instances of contact between the Prosecution and D55, referred to by the Defence,¹⁰³ do not in fact relate to such contact.¹⁰⁴ However, the first entry in the OTP Contact Log, although taken at a time when D55 was not a Defence witness and thus not covered by the Chamber's decision,¹⁰⁵ contains some information which may go to his credibility and should thus be disclosed.¹⁰⁶ At the

¹⁰⁰ See ICC-01/05-01/08-3100, paras 34 to 35; Decision on "Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications" and Addendum, 3 July 2014, ICC-01/05-01/08-3101, para. 43; and Decision on "Defence Request for Relief for Abuse of Process", 17 June 2015, ICC-01/05-01/08-3255, para. 46.

¹⁰¹ ICC-01/05-01/08-3070, paras 19 and 27.

¹⁰² See ICC-01/05-01/08-3070, para. 20.

¹⁰³ ICC-01/05-01/08-3305-Conf, para. 13.

¹⁰⁴ ICC-01/05-01/08-3307-Conf-Exp-AnxA, pages 2 to 3.

¹⁰⁵ ICC-01/05-01/08-3070, para. 25.

¹⁰⁶ ICC-01/05-01/08-3307-Conf-Exp-AnxA, pages 1 to 2.

same time, the Chamber notes that the issues covered in the first entry in the OTP Contact Log were explored at length in court during the testimony of D55, particularly by the Defence.¹⁰⁷ As such, the Defence was fully aware of the information redacted from the OTP Contact Log and its prior non-disclosure has caused no prejudice to the Defence's preparation.

53. In addition to the above, the Defence also requests that the Chamber order disclosure of "any other material generated out of [the Prosecution's] contact with D-55".¹⁰⁸ However, no substantiation is provided; for this reason, the Chamber rejects this request.

54. Turning to the Defence's request for disclosure of RFAs, the Chamber recalls its prior finding that such documents' materiality must be assessed on a case-by-case basis.¹⁰⁹ The Defence submits that through the RFAs the Prosecution sought information relevant to the credibility of Defence witnesses; however, it does not make any submissions as to why the RFAs themselves are material to the preparation of the Defence.¹¹⁰ In addition, regarding the Defence's submissions as to the Prosecution having breached "Defence immunities", created a "risk for Defence witnesses", "identified Defence witnesses", and divulged a "complete list of Defence witnesses" to Western Union,¹¹¹ the Chamber does not consider that these submissions, on their face, necessarily contradict the Prosecution's submission that no information divulged to external

¹⁰⁷ See, for example, T-264, pages 19 to 52. See also, T-189, page 34, line 21 to page 41, line 20; and ICC-02/05-03/09-501, para. 40.

¹⁰⁸ ICC-01/05-01/08-3305-Conf, para. 47.

¹⁰⁹ ICC-01/05-01/08-3100, para. 29.

¹¹⁰ ICC-01/05-01/08-3305-Conf, para. 26.

¹¹¹ ICC-01/05-01/08-3305-Conf, paras 27, 29 to 31, and 44.

sources “identified Defence witnesses as such”.¹¹² Further, the Defence provides no substantiation for the link it alleges between the arrest of a Defence witness and an RFA;¹¹³ the Chamber finds the Defence’s submission on this matter speculative. Finally, regarding the Defence’s submissions as to the Prosecution seeking to locate and contact Defence witnesses,¹¹⁴ the Chamber considers that this request effectively seeks reconsideration of the Chamber’s findings in Decision 3070.¹¹⁵ In light of the above, the Chamber finds that the Defence has failed to demonstrate the *prima facie* materiality of the RFAs of which it seeks disclosure.¹¹⁶

55. Turning to the materials arising out of the Prosecution’s investigations through Western Union, the Chamber finds that the Defence has failed to establish these documents’ materiality to its preparation. It submits that the documents “make explicit reference to the [*Bemba* case]”;¹¹⁷ however, because a document simply refers to the *Bemba* case, does not alone render it material to Defence preparation. Next, the Defence alleges that information was given to the Prosecution “on the understanding that [it was] relevant to allegations of genocide, crimes against humanity and war crimes, as opposed to an investigation into crimes against the administration of justice”.¹¹⁸ However, the Defence again provides no explanation of why this renders the documents it seeks material to its preparation.

¹¹² ICC-01/05-01/08-3305-Conf, paras 30 to 31; and Annex B to Defence Addendum to Response for admission of new Article 70 evidence, 14 March 2014, ICC-01/05-01/08-3016-Conf-AnxB, page 18.

¹¹³ ICC-01/05-01/08-3305-Conf, para. 27.

¹¹⁴ ICC-01/05-01/08-3305-Conf, paras 32 and 44.

¹¹⁵ ICC-01/05-01/08-3070, paras 13 to 18.

¹¹⁶ ICC-01/05-01/08-3305-Conf, paras 24 to 33, and 42 to 45.

¹¹⁷ ICC-01/05-01/08-3305-Red, para. 36.

¹¹⁸ ICC-01/05-01/08-3305-Red, para. 36.

56. With respect to the Defence's submission that "information obtained from Western Union" was used "as the basis for *ex parte* submissions to the Trial Chamber in relation to the credibility of Defence evidence",¹¹⁹ the Chamber notes that in the status conference and filing referred to by the Defence,¹²⁰ the Prosecution relied on only one document related to Western Union.¹²¹ This document was made available to the Defence on the Chamber's orders on 23 January 2014.¹²² As such, the Defence fails to establish any connection between the material it now seeks disclosure of and the Prosecution's prior submissions.

57. The Defence further argues that "the Prosecution itself has stated in the course of the [case ICC-01/05-01/13] proceedings that information was obtained from Western Union for the purposes of its use in the [*Bemba* case]".¹²³ However, the quotation of the Prosecution the Defence cites does not support the proposition that the information was sought for "use in the [*Bemba* case]".¹²⁴ Moreover, the Defence does not explain how its submissions as to the Prosecution's purposes in seeking information from Western Union render the material it now seeks disclosable.¹²⁵

58. For the above reasons, the Chamber finds that the Defence has failed to establish that the relevant materials relating to Western Union are material to its preparation.

¹¹⁹ ICC-01/05-01/08-3305-Red, para. 37.

¹²⁰ ICC-01/05-01/08-T-303-Red3 ENG; and Confidential Redacted Version of Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence, 31 January 2014, ICC-01/05-01/08-2548-Conf-Red, with annex confidential annex A.

¹²¹ ICC-01/05-01/08-2548-Conf-AnxA

¹²² See 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, para. 4(a), with confidential, *ex parte* annex. Pursuant to the Chamber's Decision on "Defence Motion for Reclassification of documents", 1 May 2014, ICC-01/05-01/08-3057, para. 21, ICC-01/05-01/08-2943 was reclassified as public. A public redacted version of the Annex was filed on 8 May 2014: ICC-01/05-01/08-2943-Anx-Red.

¹²³ ICC-01/05-01/08-3305-Red, para. 38.

¹²⁴ ICC-01/05-01/08-3305-Red, para. 38 and footnote 49.

¹²⁵ ICC-01/05-01/08-3305-Red, para. 38.

59. Lastly, with respect to the Defence requests that the Chamber “remain seized” of the matters raised in the First and Second Requests,¹²⁶ the Chamber notes that the Defence provides no legal basis for this relief and does not consider any further orders or findings on its part are warranted under the present circumstances.

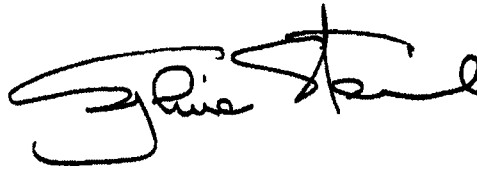
IV. Conclusion

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

- (i) **REJECTS** the First Request;
- (ii) **PARTIALLY GRANTS** the Second Request;
- (iii) **ORDERS** the Prosecution to disclose a lesser redacted version of the OTP Contact Log, leaving the information in the columns “evt_Description and Action Taken” and “evt_Descriptive Title” in the first entry in the table unredacted;
- (iv) **REJECTS** the remainder of the Second Request; and
- (v) **ORDERS** the Prosecution to file a public redacted version of its First Request Response by 16 March 2016.

¹²⁶ ICC-01/05-01/08-3264-Conf, para. 25; and ICC-01/05-01/08-3305-Conf, para. 47.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 9 March 2016

At The Hague, the Netherlands