

ANNEX A

Confidential *Ex Parte*

Defence and prosecution in
ICC01/05-01/08 and ICC-01/05-01/13

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **10 August 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***

Confidential and *Ex Parte* Defence and Prosecution in ICC-01/05-01/08 and ICC-01/05-01/13

Urgent Joint Request for Access to Confidential Material

Source: Defence for Aimé Kilolo Musamba (01/05-01/13)
Defence for Jean-Jacques Kabongo Mangenda (01/05-01/13)
Defence for Fidèle Babala Wandu (01/05-01/13)
Defence for Narcisse Arido (01/05-01/13)

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber VII

Judge Chile Eboe-Osuji, Presiding Judge
 Judge Olga Herrera Carbuccion
 Judge Bertram Schmitt

I. INTRODUCTION

1. Jean-Jacques Mangenda, Aimé Kilolo, Fidèle Babala Wandu, and Narcisse Arido (“the Defence”)¹ hereby request, pursuant to Regulation 42 of the Regulations of the Court (“Regulations”), access to, and disclosure of, all confidential *inter partes*, and *ex parte* Defence, material in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) (“Main Case”). The Prosecution has disclosed some,² but by no means all, of the relevant material from the Main Case to the parties in ICC-01/05-01/13 (“Article 70 Case”). The material of relevance in the Main Case include: (i) testimony (including of Prosecution witnesses) or submissions, tending to show that the falsehoods allegedly encouraged by the defendants in the Article 70 Case were not, in fact, falsehoods; (ii) submissions or testimony that shed light on the nature of the issues on which the accused are alleged by the Prosecution in the Article 70 Case to have encouraged false testimony; (iii) decisions, communications and filings (whether of the Trial Chamber III, Prosecution, VWU or Defence) about the modalities by which the Defence and Prosecution were to – and did – contact, reimburse and “hand-over” witnesses to the Registry; and (iv) decisions, communications and filings concerning the modalities of trial in the Main Case. This and other *inter partes* confidential information is material to the Defence’s preparation for trial in the Article 70 Case, and its disclosure serves a legitimate forensic purpose.
2. The requested disclosure raises no witness protection concerns. Four of the six parties to the Article 70 Case already know the confidential information. The Prosecution and Mr. Bemba both have knowledge of, and access to, the material; Mr. Mangenda and Mr. Kilolo have knowledge, but not access, thereto; and Mr. Babala and Mr. Arido have neither access nor knowledge. The unequal knowledge and access of the parties is inimical to a fair and efficient trial in the Article 70 Case. Conversely, no witness protection concerns arise since all defendants in the Article 70 Case will be subject, *mutatis mutandis*, to the same obligations as those applying in the Main Case.

¹ The present submission is filed confidentially pursuant to Regulation 23bis(2) of the Regulations of the Court to correspond with submissions and communications of the same classification that are cited herein. The document, out of an abundance of caution, is also classified *ex parte* Prosecution and Registry, since there are references to documents confidential to the Article 70 Case. Since the only to parties to the Main Case, the Prosecution and Mr Bemba, both have access to this document, the Defence does not object to removal of this classification, or to the reclassification of the present filing when the Prosecution re-classifies its Pre-Trial Brief.

² *Bemba*, Public Redacted Version of “Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding”, ICC-01/05-01/08-3052-Red, 3 June 2014 (“Prosecution’s April 2014 Request for Disclosure”), paras. 17, 18.

II. APPLICABLE LAW

3. Regulations 42(1) and 42(3) of the Regulations 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:

- (1) Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.

....

- (3) Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

4. This Trial 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 recipients thereof:

Since, pending their review by the Chamber, the proposed redacted versions of the transcripts will only be provided to a limited number of individuals who are bound by confidentiality obligations pursuant to Article 8 of the Code of Conduct, the Chamber finds that this approach is consistent with its duty under Article 68(1) to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witness.” As the protective measures ordered by the Chamber in the Bemba case will continue to have full force and effect in relation to case ICC-01/05-01/13, the Chamber’s approach does not amount to a variation of protective measures. In these circumstances, the requirement under Regulation 42(4) of the Regulations to seek the witnesses’ consent is therefore not applicable.³

³ *Bemba*, 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”, ICC-01/05-01/08-3014, 12 March 2014 (“March 2014 Request for Variance of Protective Measures”), para. 15.

5. Even assuming that it is a “variation,” the application of the same protective measures *mutatis mutandis* is a factor favouring sharing the material:

as long as the protective measures ordered by the Chamber remain unchanged and the information protected by such measures is not released to the public, press and information agencies, the Chamber is satisfied that such information could be shared with a Chamber, parties or participants in different proceedings before the Court, all of whom are bound to respect the confidentiality of such information.⁴

6. This Trial Chamber has also recognised, assuming that Regulation 42(3) is applicable, that the obligation of consultation under Regulation 42(4) is not absolute and applies only “whenever possible.”⁵ The Trial Chamber ordered full disclosure of the testimony of all Defence witnesses in the Main Case to the parties in the Article 70 Case on the basis of Prosecution arguments that “the items comprise evidence that are material” to the Article 70 Case.⁶
7. The criteria for granting access to confidential material under Regulation 42(3) are not fully developed in ICC jurisprudence, or have been developed in confidential decisions to which the Defence has no access.⁷ In the absence of public jurisprudence, resort may be had to the extensive jurisprudence of the ICTY and ICTR, whose Rules 75(F) and (G) are substantially identical to, and presumably the inspiration for, Regulations 42(1) to (3). The “well established” jurisprudence was comprehensively summarised in a recent decision:

[I]t is well established that a party may obtain confidential material from another case to assist it 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. The first requirement is not a particularly onerous one. The Appeals Chamber has held that requests for access to “all confidential material” can be sufficiently specific to meet the identification standard. With respect to the second requirement, the standards for access differ for each category of confidential material. With respect to confidential *inter partes* material, 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

⁴ *Bemba*, Decision on “Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding”, ICC-01/05-01/08-3074, 27 May 2014 (“Prosecution’s May 2014 Request for Disclosure”), para. 17.

⁵ March 2014 Request for Variance of Protective Measures, para. 18.

⁶ Prosecution’s May 2014 Request for Disclosure, para. 7 (“The prosecution further observes that the link between the testimonies and case ICC-01/05-01/13 is direct as ‘witnesses in one case allegedly testified falsely, their testimony therefore comprises material evidence of the crimes charged in the Article 70 case.’”)

⁷ Prosecution’s April 2014 Request for Disclosure, para. 17 (citing confidential decisions in the *Katanga* and *Ntaganda* cases where such orders were apparently issued).

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.” The standard does not require the applicant to go so far as to establish that the material sought would likely be admissible evidence. With respect to *ex parte* confidential material, the Appeals Chamber has required an applicant to meet a higher standard in establishing a legitimate forensic purpose for its disclosure.⁸

8. The ICC Prosecution itself appears to have adopted this “nexus” requirement, previously arguing before this Chamber that the “Article 70 proceedings pending before Pre-Trial Chamber II has a direct nexus to the *Bemba* case.”⁹
9. Disclosure of “all confidential material” is a suitably specific category of disclosure. Defining the scope of disclosure more narrowly, and with reference to complex criteria and sub-categories, would be inefficient and slow down the disclosure process.¹⁰ While not each and every item within the category may be material, all that is required for disclosure is that there be “a good chance” that material within the

⁸ *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. 5-8 (emphasis added).

⁹ *Bemba*, Prosecution Request for Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, ICC-01/05-01/08-2951, 30 January 2014, para. 8 (emphasis added).

¹⁰ *Stanišić & Simatović*, IT-03-69-A & IT-95-5/18-T, Decision on Motion by Radovan Karadžić for Reconsideration of Decision on Motion for access to Confidential Materials in the *Stanišić and Simatović* Case, 16 February 2015, p. 4 (“**ALLOWS** Karadžić, subject to the conditions set forth below, access to *inter partes* confidential material in the trial record in the *Stanišić and Simatović* case related to events in Croatia with the exception of material provided under Rule 70”); *Mladić*, IT-09-92-T/IT-08-91-A, Decision on Motions on Behalf of Mićo Stanišić and Stojan Župljanin for Access to Confidential Materials from the *Mladić* Case, 3 September 2013 (“**ORDERS** the Prosecution and the Mladić Defence to determine without undue delay which of the above material is subject to the provisions of Rule 70 of the Rules, and to seek the consent of the material’s providers for its disclosure to the respective Applicants, and, where such consent is given, to identify that material to the Registry; **REQUESTS** the Registry to disclose to the Applicants, the following material : (i) the inter partes confidential, non-Rule 70 material once it has been identified by the Prosecution and the Mladić Defence in accordance with this decision ; and (ii) the Rule 70 material once the Prosecution and Mladić Defence have identified such material upon receiving consent from the Rule 70 providers”); *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, para. 17(a) (“**ORDERS** the Prosecution to identify for the Registry the following confidential inter partes material relating to the period of 1991 to 1993 of the *Martić* case for disclosure to the Defence, which are not subject to Rule 70 of the Rules : (i) confidential *inter partes* filings excluding material related to (a) conditions of detention, (b) remuneration or assignment of counsel, (c) the health of Milan Martić, (d) provisional release, (e) subpoenas, (f) memoranda concerning witness scheduling, (g) order concerning subpoenas to give testimony, and (h) redaction of the public transcript of the public and public broadcast of a hearing ; (ii) confidential and under seal exhibits ; and (iii) transcripts from all relevant closed and private sessions.”).

category “will materially assist the applicant” in the preparation of his or her defence.¹¹

10. The ICC Appeals Chamber has also held that the Prosecution’s obligation to disclose “material to the preparation of the defence” is to be “interpreted broadly.”¹² The same principle should be deemed applicable to any source of information, be it records held by the Registry or those held by the Prosecution.

III. SUBMISSIONS

(i) *Extensive Material from the Main Case Has a Nexus to the Article 70 Case and its Disclosure Will Serve a Legitimate Forensic Purpose*

11. 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. If the testimony given is not false, then the crime has not been committed and, consequently, could not have been aided and abetted.
12. The Prosecution’s Pre-Trial Brief in the Article 70 Case asserts that various untruths were encouraged in the Main Case. The details of those allegations are not necessary to the determination of the present request, and would risk inappropriately contaminating this Trial Chamber’s deliberations. The existence of such allegations may, nevertheless, be readily inferred based upon the procedural history of the Article 70 Case of which the Trial Chamber already does have notice.
13. The extent to which confidential *inter partes* material in the Main Case is relevant to the Article 70 case has been affirmed by the Prosecution itself. The Prosecution has previously submitted to this Trial Chamber that the Article 70 Case has a “direct nexus

¹¹ *Brđanin*, IT-99-36-A, Decision on Mičo Stanišić’s Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007, para. 11.

¹² *Banda and Jerbo*, 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”, ICC-02/05-03/09-501, 28 August 2013, para. 38 (“Regarding the application of rule 77 in general, the Appeals Chamber recalls that in its *Lubanga OA 11* judgment, it held that “the term ‘material to the preparation of the defence’ must be interpreted broadly”. It found that documents that were “not directly linked to exonerating or incriminating evidence” were nevertheless material to the preparation of the accused’s defence in that case. The overarching consideration is whether the objects are “material to the preparation of the defence”, which was found in that judgment to “be understood as referring to all objects that are relevant for the preparation of the defence”).

to the *Bemba* case.”¹³ The Prosecution has also claimed that it has disclosed a large volume of material relevant to the credibility of Defence witnesses – the same witnesses the Prosecution now asserts were induced to lie at the behest of the accused in the Article 70 Case, and of whom eight are now being relied upon as credible Prosecution witnesses:

The Prosecution disclosed significant information placing the Defence on notice of the credibility challenges to Defence witnesses. Specifically, between July 2012 and mid-November 2013, during the Defence case, the Prosecution disclosed over 2,000 pages of rule 77 material. The Defence cannot seriously contend that the Prosecution deprived it of an opportunity to consider significant information.

During the Defence case and prior to the testimonies of Defence witnesses, the Prosecution also disclosed information pertaining to their credibility, such as screening notes, investigator’s reports, prior statements, witness statements and annexes regarding Defence evidence, allegations of [REDACTED], and prior criminal records.¹⁴

14. Other elements of the *inter partes* confidential material in the Main Case are relevant to the Article 70 Case. The modalities and reasons for contacting witnesses, for example, are reasonably believed to be amongst those materials, and are directly relevant for the defences of both Mr. Kilolo and Mr. Mangenda. While some of the relevant issues have been addressed in a VWU filing in the Article 70 Case,¹⁵ the Defence has the right to obtain all relevant information on which that filing was based.
15. The Defence has reason to believe that not only is much of the confidential information material to the preparation of the defence in the Article 70 Case, but that it is exculpatory. The Prosecution, however, has disclosed virtually no documents to the Defence from the Main Case pursuant to Article 67(2). The absence of any such disclosure should be a cause of concern. As stated in one ICTY case:

Nor, unfortunately, has the prosecution always complied with its obligations under Rule 68 in a timely manner. In any event, the range of material within the Tribunal to which a party may legitimately seek access may well be wider in the particular case than the class of

¹³ *Bemba*, Prosecution Request for Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding, ICC-01/05-01/08-2951, 30 January 2014 (“January 2014 Request for Variance of Protective Measures”), para. 8 (emphasis added).

¹⁴ *Bemba*, Public Redacted Version of “Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’”, 13 July 2015, ICC-01/05-01/08-3265-Conf, ICC-01/05-01/08-3265-Red, 20 July 2015, paras. 9-10 (internal citations omitted).

¹⁵ *Bemba et al.*, Victims and Witnesses Unit’s Provision of Information Pursuant to Decision ICC-01/05-01/13-182, ICC-01/05-01/13-207-Conf, 19 February 2014.

documents which must be disclosed pursuant to Rule 68. It is certainly not for the prosecution to attempt to categorise them in a way which avoids its obligation, as a Minister of Justice, to assist the defence to present its case where a legitimate forensic purpose has been established.”¹⁶

16. Mr. Mangenda is alleged to have communicated questions of the Legal Representatives for Victims to Mr. Kilolo, who is alleged to have shared these questions with a witness.¹⁷ The Prosecution itself sought disclosure of, and the Chamber granted, the specific questions that are alleged to have been communicated.¹⁸ The typical content of such questions, the modalities by which they were shared with the Defence, and even as simple a question as their level of confidentiality, are all matters of relevance to the Article 70 Case.
17. The Prosecution may be expected to argue that the testimony of its own witnesses is irrelevant to the Article 70 case, as are the documents and submissions that it has not already selected for disclosure. These arguments should be rejected. Prosecution witness testimony 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. Further, the category of information sought includes not only Prosecution witness testimony, but also filings concerning the modalities of trial, the timing of the appearance of witnesses, periods of adjournment, and a host of other procedural issues that may be of direct or contextual relevance to the allegations. The Defence’s ability to establish this relevance with precision is, of course, precluded by its lack of access to the material; what cannot be denied, however, is there is a “good chance” that this information will be material to the preparation of the Defence.

(ii) *The Asymmetry of Information Available to the Parties in the Article 70 Case Damages the Fairness and Efficiency of Proceedings*

18. Two parties to the Article 70 Case – the Prosecution and Mr. Bemba – have full knowledge and access to all confidential *inter partes* and *ex parte* Defence material in the Main Case. Two other parties – Mr. Mangenda and Mr. Kilolo – have full

¹⁶ *Hadžihasanović et al.*, IT-01-47, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para. 13.

¹⁷ Pre-Trial Brief, para.79.

¹⁸ Prosecution’s May 2014 Request for Disclosure, paras. 3, 23, ordering disclosure of the ‘Items’, which included *inter alia* two confidential filings of the legal representatives of victims containing lines of questioning for Witness D04-15.

knowledge, but not access, to most confidential material in the Main Case, including the identities of all protected Prosecution witnesses. Granting Mr. Mangenda and Mr. Kilolo access to confidential material is, as the Prosecution itself has argued, little more than “an academic exercise”¹⁹ – but one that will undoubtedly assist the preparation of their defence.

19. Neither Mr. Arido nor Mr. Babala has knowledge of, or access to, confidential material from the Main Case. Both will accordingly be substantially disadvantaged if the other four parties can identify and rely upon such material, whereas they cannot.
20. Different levels of access to information will also mean that the Prosecution and the Bemba Defence will be obliged to file any such material *ex parte*, to the exclusion of all other parties. This will be unfair, as well as obstructing the smooth and efficient conduct of proceedings. Only full disclosure of all confidential material from the Main Case will avoid this highly unfortunate and unfair situation.

IV. CONCLUSION AND RELIEF REQUESTED

21. The Main Case and the Article 70 Case are materially intertwined in numerous ways. Confidential material in the former is material to the preparation of the Defence in the latter. The fairness of the Article 70 Case, as well as the efficiency of those proceedings, would be substantially impaired by denying the Defence access to this information. No 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 Main Case.
22. The Defence accordingly requests that it be granted access, pursuant to Regulation 42 of the Regulations, to:

¹⁹ January 2014 Request for Variance of Protective Measures, para. 12 (“As the Chamber is aware, Jean-Pierre Bemba Gombo and two members of his Defence team in the *Bemba* Case comprise three of the five suspects in the Article 70 Case. They, like the Prosecution, are already fully privy to the requested transcripts of evidence. As to them, the requested access is very nearly an academic exercise. However, the requested variance is concretely necessary to ensure that all the Defence teams in the Article 70 Case have sufficient access to the transcripts of relevant evidence in the Bemba Case in order to prepare adequately for the confirmation hearing and later for trial.”)

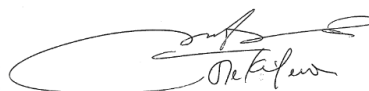
- (a) All confidential transcripts in the Main Case, including of all Prosecution and Chamber witnesses;
- (b) All confidential exhibits in the Main Case;
- (c) All confidential *inter partes* or *ex parte* filings by the Chamber, the Prosecution, Defence, or any organ of the Registry or from any other source whatsoever;
- (d) All confidential *inter partes* communications by the Trial Chamber, Prosecution, Defence, or any organ of the Registry, to any party; and
- (e) All confidential disclosure provided by the Prosecution to the Defence in the Main Case.



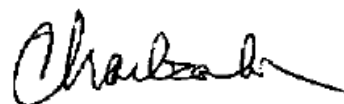
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Dated this 10 August 2015,
At The Hague, The Netherlands