

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 3 September 2012

**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 Regarding Prosecution Disclosure"**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Ms Petra Kneuer

**Counsel for the Defence**

Mr Aimé Kilolo Musamba

Mr Peter Haynes

**Legal Representatives of the Victims**

Ms Marie Edith Douzima-Lawson

Mr Assingambi Zarambaud

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Trial Chamber III (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on “Defence Motion Regarding Prosecution Disclosure”.

## **I. Background and submissions**

1. On 14 August 2012, the defence commenced the presentation of its evidence with the questioning of Witness D04-53. On the same day, the Office of the Prosecutor (“prosecution”) communicated, by way of an email,<sup>1</sup> its list of 41 documents to be used for questioning the witness. It also filed a disclosure note, stating that 10 of the 41 documents were disclosed under Rule 77 of the Rules of Procedure and Evidence (“Rules”).<sup>2</sup>
2. On 17 August 2012, by oral decision, the Chamber authorised the use of the recently disclosed documents for the purpose of questioning Witness D04-53,<sup>3</sup> on the basis that the defence had not been unfairly prejudiced by the delayed disclosure of those documents.<sup>4</sup> The defence did not seek to appeal this decision.
3. On 17 August 2012 the defence filed the “Defence Motion Regarding Prosecution Disclosure” (“Defence Request”).<sup>5</sup> The defence firstly argues that the late disclosure on 14 August 2012 of Rule 77 material prejudiced the defence.<sup>6</sup> The defence secondly requests that, for the remainder of the defence case, the prosecution is reminded that it is under an obligation to disclose material for the preparation of the defence “as soon as practicable”.

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<sup>1</sup> Email from the prosecution case manager to the defence, the legal representatives and the Chamber on 14 August 2012 at 16:59.

<sup>2</sup> Prosecution’s Communication of Rule 77 Evidence Disclosed to the Defence on 14 August 2012, 14 August 2012, ICC-01/05-01/08-2262 and confidential Annex A.

<sup>3</sup> Transcripts of hearing on 17 August 2012, ICC-01/05-01/08-T-232-CONF-ENG ET, 17 August 2012, page 49, lines 16-17.

<sup>4</sup> *Ibid*, p. 49, lines 7-8.

<sup>5</sup> Defence Motion Regarding Prosecution Disclosure, 17 August 2012, ICC-01/05-01/08-2269-Conf.

<sup>6</sup> ICC-01/05-01/08-2269-Conf, paragraphs 12, 13 and 16.

It submits that the prosecution has been on notice of the defence case since November 2010 and has been in possession of detailed witness summaries since 13 July 2012.<sup>7</sup> The defence finally expresses concern and suggests that the use of newly-disclosed material “will inevitably lead to unnecessary repetitive litigation”.<sup>8</sup> In order to avoid such a scenario, the defence requests the Chamber to order:

- (i) The Prosecution to conduct a full review of all relevant databases and archives, and provide the Defence with any additional disclosable material in its possession, by 31 August 2012;
- (ii) The Prosecution to formally certify that it has fully complied with its disclosure obligations by 31 August 2012; and
- (iii) The Prosecution to be precluded from using or relying on any undisclosed material in its possession as at 31 August 2012 in the present proceedings.<sup>9</sup>

4. On 23 August 2012, the prosecution filed its “Prosecution Response to ‘Defence Motion Regarding Prosecution Disclosure’” (“Response”),<sup>10</sup> in which it requests the Chamber to reject the Defence Request in its entirety.<sup>11</sup> The prosecution submits that the Defence Request is, *inter alia*, illogical and unnecessary as it effectively seeks a remedy which would be contrary to previous judicial orders, would in effect impede the Chamber in determining the truth and would be “unnecessary to protect the accused’s rights.”<sup>12</sup>

## II. Relevant Provisions

5. In making this ruling, the Chamber has considered, in accordance with Article 21(1) of the Rome Statute (“Statute”), Articles 64(2), 64(6)(f), 64(7),

<sup>7</sup> ICC-01/05-01/08-2269-Conf, paragraphs 18 and 19.

<sup>8</sup> ICC-01/05-01/08-2269-Conf, paragraph 20.

<sup>9</sup> ICC-01/05-01/08-2269-Conf, paragraph 21.

<sup>10</sup> Prosecution Response to ‘Defence Motion Regarding Prosecution Disclosure’, 23 August 2012, ICC-01/05-01/08-2283-Conf.

<sup>11</sup> *Ibid*, paragraph 25.

<sup>12</sup> ICC-01/05-01/08-2283-Conf, paragraphs 2 and 6.

67(1)(b), 67(2) and 69(3) of the Statute, Rules 76, 77 and 140 of the Rules and Regulations 23bis(1) and (3) and 35(2) of the Regulations of the Court (“Regulations”).

### III. Analysis and Conclusions

6. At the outset, the Chamber will not consider the defence’s argument with regard to material disclosed on 14 August 2012 as this issue has already been adjudicated by oral decision on 16 August 2012 and the defence did not seek leave to appeal this decision.<sup>13</sup>
7. Under the abovementioned legal provisions, the Chamber has the duty to ensure that the prosecution fulfils its disclosure obligations and that the subsequent use of documents during the questioning of defence witness takes place with full respect for the rights of the accused.
8. In the present case, with regard to disclosure matters, the prosecution had the obligation to disclose incriminatory documents it intended to rely on at trial by 30 November 2009.<sup>14</sup>
9. With regard to disclosure of Article 67(2) items and Rule 77 material, the Chamber recalls its “Decision on defence disclosure and related issues” (“Decision on Defence Disclosure”).<sup>15</sup> The Chamber hereby reiterates that the prosecution has been instructed that, as an ongoing obligation during the trial proceedings, it shall disclose any Article 67(2) items or permit the defence to inspect any Rule 77 material in its possession or

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<sup>13</sup> Transcripts of hearing on 17 August 2012, ICC-01/05-01/08-T-232-CONF-ENG ET, 17 August 2012, page 45, line 19 to page 49, line 18.

<sup>14</sup> Order on disclosure of evidence by the Office of the Prosecutor, 4 November 2009, ICC-01/05-01/08-590, paragraphs 6 and 7.

<sup>15</sup> Decision on defence disclosure and related issues, 24 February 2012, ICC-01/04-01/06-2141, paragraph 21 (b).

control, *promptly upon their identification*, throughout the presentation of evidence by the defence.<sup>16</sup>

10. The Chamber further reiterates that the prosecution is under an ongoing obligation to regularly review the material in its possession in light of the disclosure and inspection requirements under Article 67(2) of the Statute and Rule 77 of the Rules. Here, the prosecution has been aware of the defence's list of witnesses and the related summaries of their statements since 13 July 2012. The prosecution avers that, as of this date, it has undertaken such a review of the documents contained in all its databases "in order to disclose information that newly appears to be material to the preparation of the defence".<sup>17</sup> At this stage, the Chamber has no reason to doubt this assertion.

11. The Chamber is of the view that additional and late disclosure may be necessary for the prosecution to fulfil its ongoing disclosure obligations pursuant to Article 67(2) and Rule 77. In exceptional cases, a document which was not previously subject to disclosure under those provisions may become disclosable on the basis of the testimony of a witness. In such a situation, the need for disclosure of the document may not have been foreseen before the commencement of the relevant testimony. However, in order to ensure that the defence is not unfairly prejudiced, and to enable the defence to have sufficient time to prepare, the Chamber has previously ruled in the Decision on Defence Disclosure that:

If the prosecution wishes to use documents when questioning a witness called by the defence, it must, *at least three working days before questioning the witness*, provide the Trial Chamber, the defence and the legal representatives with a list of the documents it intends to use. The list shall identify the specific material intended to be submitted as evidence during the questioning

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<sup>16</sup> ICC-01/04-01/06-2141, paragraph 31 and 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-Red, paragraph 34..

<sup>17</sup> ICC-01/05-01/08-2283-Conf, paragraph 14.

of the witness and the level of confidentiality of each document.<sup>18</sup>[emphasis added]

12. In line with the above, although the Chamber disfavours late disclosure in principle, however, in the event that, for justifiable reasons, late disclosure occurs, the Chamber reiterates that it will analyse the items at issue on a case-by-case basis in order to determine whether such late disclosure is unfairly prejudicial to the defence. The Chamber, in its analysis, may pay particular attention to the nature of the disclosed documents and the reasons justifying the late disclosure, and especially the reasons why it could not have been disclosed earlier.
13. The Chamber therefore is not convinced that ordering the prosecution to conduct a full review of all relevant databases and archives and to provide the defence with any additional disclosable material in its possession, by a certain date, would serve any purpose or address the issue of unavoidable late disclosure. Similarly, the Chamber sees no merit in ordering the prosecution to certify that it has fulfilled its disclosure obligations as regards Article 67(2) items and Rule 77 material, since as previously stressed, such disclosure obligations are ongoing during the defence's presentation of evidence.
14. In line with the above, the defence's request to preclude the prosecution from using or relying on any undisclosed material in its possession as of 31 August 2012, is unwarranted and therefore rejected.
15. For the foregoing reasons, the Chamber **REJECTS** the Defence Request.

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<sup>18</sup> *Ibid*, paragraph 21 (b).

*Level of confidentiality of underlying submissions*

16. Finally, the Chamber notes that the defence filed its Request as “confidential” without stating the factual and legal basis for this chosen classification, in violation of Regulation 23bis(1) of the Regulations. The Chamber considers that the defence Request refers to specific material and legal issues, which, although raised in confidential written and oral submissions, are of a public nature. The Chamber therefore finds that a reference to a transcript of hearings held in private session can be made public. However, the Chamber notes that the parties, to a limited extent, referred to documents or information, which may be considered as confidential.<sup>19</sup>

17. Therefore, pursuant to the principle of publicity of proceedings and in application of Regulation 23bis(3) of the Regulations, the Chamber **ORDERS:**

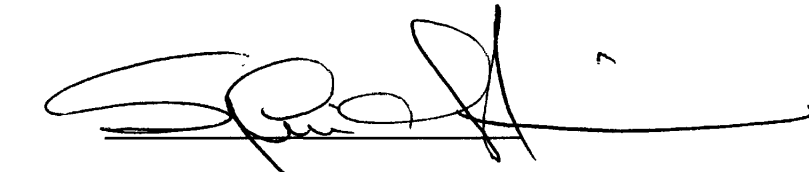
- a. the defence to file as public with appropriate redactions as the case may be, document ICC-01/05-01/08-2269-Conf no later than 16h00 on Wednesday 5 September 2012; and
- b. the prosecution to file as public, with appropriate redactions as the case may be, documents ICC-01/05-01/08-2283-Conf and ICC-01/05-01/08-2283-Conf-AnxA no later than 16h00 on Friday 7 September 2012.

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<sup>19</sup> See for example identifying information in footnote 9 of the Defence Request or reference to a confidential Decision in footnote 21 of the prosecution’s Response.



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



**Judge Sylvia Steiner**



**Judge Joyce Aluoch**



**Judge Kuniko Ozaki**

Dated this Monday 3 September 2012

At The Hague, The Netherlands