

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **26 February 2010**

**TRIAL CHAMBER III**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio-Benito  
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC  
IN THE CASE OF  
THE PROSECUTOR  
V. *JEAN-PIERRE BEMBA GOMBO***

**Public Redacted version of “ICC-01/05-01/08-688-Conf-Exp”**

**Source:** The Office of the Prosecutor

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

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| <b>The Office of the Prosecutor</b> | <b>Counsel for the Defence of Jean-Pierre Bemba</b><br>Mr Nkwebe Liriss<br>Mr Aimé Kilolo Musamba |
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|-----------------------------------------|--------------------------------------------|
| <b>Legal Representatives of Victims</b> | <b>Legal Representatives of Applicants</b> |
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| <b>Unrepresented Victims</b> | <b>Unrepresented Applicants for Participation/Reparation</b> |
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| <b>The Office of Public Counsel for Victims</b> | <b>The Office of Public Counsel for the Defence</b> |
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| <b>States Representatives</b> | <b>Amicus Curiae</b> |
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#### **REGISTRY**

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## I. Introduction

1. The Defence requests the Trial Chamber III (“Chamber”) to order the Office of the Prosecutor (“Prosecution”) to disclose any recordings, notes or transcripts of pre-interview assessments (collectively “pre-interview assessments”) of all persons contacted or interviewed by the Prosecution in connection with the investigation of this case.<sup>1</sup>

2. Relying upon Article 67(2) of the Rome Statute (“Statute”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”), the Defence states that the request would permit it and the Chamber to, *inter alia*, know the subjective considerations leading witnesses to accept or refuse to cooperate with the Prosecution, examine the conditions under which testimony was obtained, allow better evaluation of contradictions with *viva voce* testimony, and ensure that no potentially exculpatory (“PEXO”) information had been neglected.<sup>2</sup> The Defence further requests the Chamber to bar the Prosecution from calling witnesses whose pre-interview assessments are not disclosed.<sup>3</sup>

3. The Prosecution submits that, in general, pre-interview assessments of witnesses unlike witness statements are internal work product under Rule 81(1) of the Rules and thus not subject to disclosure.

4. Nevertheless, the Prosecution notes that its disclosure obligations under the Statute and Rules require it to review all information in its possession or control, which includes pre-interview assessments, for the purposes of disclosing either PEXO under Article 67(2) of the Statute or information falling within the scope of

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<sup>1</sup> ICC-01/05-01/08-668-Conf-Exp.

<sup>2</sup> ICC-01/05-01/08-668-Conf-Exp, paras. 21 to 24.

<sup>3</sup> ICC-01/05-01/08-668-Conf-Exp, para. 26.

Rule 77 of the Rules. Such information is subject to review and disclosure *if* PEXO or Rule 77 information material to the Defence is contained therein.

5. The Prosecution notes that the Defence has failed to justify the legal basis upon which it seeks pre-interview assessments of the Prosecution's incriminating witnesses where they contain neither PEXO nor Rule 77 information material to its preparation.

6. In this response, the Prosecution will address the following disclosure categories affected by the Defence request for pre-interview assessments: incriminating witnesses that it intends to call at trial ("Prosecution's incriminating witnesses"), witnesses it does not intend to rely upon or has disclosed to the Defence as PEXO or Rule 77 material ("non-incriminating witnesses"), and any person the Prosecution unilaterally chose not to select as a witness in the course of its investigations ("screened or contacted persons").

7. Additionally, the Prosecution submits that prosecutorial discretion under Article 54 of the Statute rests primarily with the Prosecutor<sup>4</sup> and there is a presumption of honour and good faith.<sup>5</sup> Decisions taken by the Prosecutor regarding the strategy or methodology employed during investigations, which may or may not include pre-interview assessments, are not subject to scrutiny by the Defence.<sup>6</sup>

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<sup>4</sup> *Situation in the Democratic Republic of the Congo*, ICC-01/04-556, "Judgment on Victim Participation in the Investigation Stage of the Proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 7 December 2007 and in the appeal of the OPCD and the Prosecutor against the decision of the Pre-Trial Chamber I of 24 December 2007", 19 December 2008, para. 52.

<sup>5</sup> *The Prosecutor v. Blaskić, Blaškić* (IT-95-14) Lašva Valley, 29 July 2004, para. 264: "...the responsibility for disclosing exculpatory evidence rests solely on the Prosecution and that the determination ... falls within the Prosecution's discretion...", "The Prosecution is under no legal obligation to consult with an accused to reach a decision on what material suggests the innocence or mitigates the guilt of an accused or affects the credibility of the Prosecution's evidence. The issue of what evidence might be exculpatory evidence is primarily a facts-based judgement made by and under the responsibility of the Prosecution."

<sup>6</sup> In *The Prosecutor v. Abu Garda*, ICC-02/05-02/09-186, 19 October 2009, pages 5 and 6, PTC I allowed the Defence to call a witness from the Prosecution, stating that "... only questions bearing on objective facts will be considered as admissible", "... judgments or evaluations of a discretionary nature (including without limitation matters of prosecutorial discretion) will be considered as not admissible", "... questions aimed at challenging the

8. Nevertheless, assuming that it is ever appropriate to contest prosecutorial discretion under Article 54 of the Statute, the Defence must first make a compelling factual showing sufficient to trigger an examination of the decisions and strategies of the Prosecution. The Defence has failed to do so.

9. In view of all above, the Prosecution respectfully requests the Chamber to dismiss the Defence request as unfounded since the Defence has failed to make a compelling showing, either legal and/ or factual. Further, the Prosecution has fulfilled its obligation to disclose PEXO under Article 67(2) of the Statute and Rule 77 information material to the Defence.

## II. Procedural History

10. On 30 December 2009, the Defence sent an “*Urgent: Déposition d’un témoin du procureur du 6 mars 2008 (EVD-P-03120)*”<sup>7</sup> email to the Prosecution requesting disclosure of the interview of [REDACTED] conducted on 6 March 2008, which it believed was possibly omitted during the pre-trial disclosure. It noted that this interview was referred to in the witness’ statement of 17 March 2008, which had been disclosed.

11. On 7 January 2010, the Prosecution responded to the Defence email stating that a pre-interview assessment had been conducted on 6 March 2008 in order to determine whether the witness could provide information relevant to the investigations.<sup>8</sup> Thereafter a formal interview was conducted in accordance with Rule

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investigative methods followed by the OTP will be deemed as not admissible by the Chamber, either *proprio motu* or upon a request by the Prosecutor”.

<sup>7</sup> ICC-01/05-01/08-668-Conf-Exp-AnxA.

<sup>8</sup> ICC-01/05-01/08-668-Conf-Exp-AnxA.

111 of the Rules, collectively capturing all the issues raised on 6 March 2008 and more, which had been disclosed to the Defence.

12. On 14 January 2010, the Defence filed its *“Requête en vue de la divulgation de toutes les interviews préliminaires d’évaluation de tous les témoins du Procureur en vertu de l’article 67(2) du Statut et de la Règle 77 du Règlement de Procédure et de Preuve”* (“Defence Request”).<sup>9</sup> The Defence again requested the pre-interview assessment of [REDACTED] and expanded this to include the pre-interview assessments of all the Prosecution’s incriminating witnesses, all its non-incriminating witnesses, and all its screened or contacted persons. It further requested the Chamber to subsequently rule that the Prosecution could not call any witnesses for whom pre-interview assessments had not been disclosed.

### **III. Request for Confidentiality**

13. The Prosecution requests that this Response and Annex A appended herewith be received by the Chamber as “Confidential, *Ex Parte*, Prosecution and Defence Only” as it relates to matters addressed in the Defence Request which was filed as confidential. Annex A contains a list of pre-interview assessments that will be disclosed to the Defence.

### **IV. Prosecution’s Response**

Disclosure of any notes, transcripts and other similar documents related to the pre-interview assessments of Prosecution witnesses

14. The Defence avers to the possible categorization of pre-interview assessments as prior statements by stating that the Prosecution restrictively applied its disclosure

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<sup>9</sup> ICC-01/05-01/08-668-Conf-Exp.

obligations under Rule 76(1) of the Rules.<sup>10</sup> The Prosecution disagrees. A pre-interview assessment is *not* an accurate record of evidence provided by a witness. As Judge Fulford noted in *Lubanga*, “screening notes or investigator’s notes, or similar documents ... are not the same as a signed witness statement or an electronic recording of an interview, both of which provide a certain record of the witness’s evidence approved by or coming from the witness. Screening notes and investigator’s notes will be a personal record - not the witness’s - of what the latter said ... the lack of a signature casts doubt over whether the witness accepted the contents as accurate.”<sup>11</sup>

15. A pre-interview assessment notes the investigator’s impression of the type of information that a witness can provide to the overall investigations in the case. As such, it is a document of the investigator, not the witness. The witness does not make a formal statement: the notes are neither signed by the witness nor are reasons provided for the lack of signature, as is required under Rule 111 of the Rules; they do not record the witness’ statement; they were neither read back nor shown to and subsequently adopted by the witness as an accurate record of information provided. The pre-interview assessment was an organizational tool utilized by the Prosecution to determine whether the witness could provide information relevant to the Prosecution’s mission to uncover the truth regarding the crimes committed in the Central African Republic (“CAR”).

(i) [REDACTED]

16. Thus, with respect to the Defence’s specific request for the pre-interview assessment of [REDACTED], that document is not a statement subject to disclosure. The conversation with [REDACTED] was not an interview and was not intended to

<sup>10</sup> ICC-01/05-01/08-668-Conf-Exp, para. 19.

<sup>11</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Transcript number T-104, 16 Jan 2009, pages 24-25.

constitute a record of evidence from him. Instead, it was purely a pre-interview assessment to determine whether the witness had relevant information to offer. Consequently, it does not have the mandatory ingredients to constitute a formal statement under Rule 111 of the Rules.

17. [REDACTED]'s subsequent statement in compliance with Rule 111 of the Rules, which was disclosed to the Defence on 10 November 2009,<sup>12</sup> captures all the issues raised on 6 March 2008 and more information. The Prosecution has again reviewed the notes of the pre-interview assessment of [REDACTED] and concludes that it does not contain any PEXO or Rule 77 information material to the Defence.

(ii) The Prosecution's incriminating witnesses

18. The Defence further contends that the Prosecution is obligated to disclose pre-interview assessments of all incriminating Prosecution witnesses whose names have been disclosed as either Rule 77 information material to its preparation or PEXO material under Article 67(2) of the Statute.<sup>13</sup>

19. The Prosecution notes that the obligation to disclose PEXO and Rule 77 information is ongoing, and it remains best placed to evaluate its evidence in accordance with its disclosure obligations. As the Chamber stated, it "... rejects the defence submission that the prosecution has an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions

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<sup>12</sup> ICC-01/05-01/08-606-Conf-Exp-AnxA.

<sup>13</sup> ICC-01/05-01/08-668-Conf-Exp, paras. 21 and 22.



he wishes to advance. The prosecution does not have the obligation of 'handing the defence the keys to the warehouse' in this way.<sup>14</sup>

20. The Prosecution's view is that such pre-interview assessments should only be disclosed if they contain PEXO or Rule 77 information and this information is not available to the Defence in any other form, such as a witness statement. It has identified two pre-interview assessments for the Prosecution's incriminating witnesses as either PEXO or Rule 77 information material to the preparation of the Defence. These documents, which are listed in Annex A, will be disclosed to the Defence.

Disclosure of any recordings, notes or transcription of any witness assessments or persons the Prosecution decided not to rely upon, including the reasons for any such conclusions, in order to enable an assessment of the Prosecution's compliance with its obligation to provide exculpatory information

21. The Appeals Chamber confirmed that "(m)anifestly, authority for the conduct of investigations vests in the Prosecutor."<sup>15</sup> Thus the conduct of investigations under Article 54 of the Statute and specifically the obligation to investigate incriminating and exculpatory circumstances equally,<sup>16</sup> is the subject of Prosecutorial discretion. The Prosecution submits that it is not required to explain its reasons for investigative strategies or the selection of evidence it deems necessary to prove its case at trial.<sup>17</sup>

<sup>14</sup> ICC-01/05-01/08-632, "Decision on the Defence application for additional disclosure relating to a challenge on admissibility", para. 26, also citing para. 31 of "Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court", issued by the Judiciary of England and Wales, 20 February 2006.

<sup>15</sup> *Situation in the Democratic Republic of the Congo*, ICC-01/04-556, "Judgment on Victim Participation in the Investigation Stage of the Proceedings in the appeal of the OPCD against the decision of the Pre-Trial Chamber I of 7 December 2007 and in the appeal of the OPCD and the Prosecutor against the decision of the Pre-Trial Chamber I of 24 December 2007", 19 December 2008, para. 52.

<sup>16</sup> Article 54(1)(a).

<sup>17</sup> Trial Chamber III, Decision on the "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth -Analysis Chart", ICC-01/05-01/08-682, 29 January 2010, para. 21 quoting the Trial Chamber II in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-956, para. 6: "... the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial ..."

22. Moreover, it cannot be a defence to the charges or a refutation of the evidence to be adduced at trial that the Prosecution failed to exhaust all conceivable avenues of inquiry during the investigation. Imposing such a standard would effectively paralyze investigations; authorizing such an inquiry as a matter of course after charges are brought would equally effectively paralyze prosecutions. Nor is there any basis in this instance for an inquiry into whether the Prosecution failed to actively look for exculpatory evidence.

23. In accordance with its ongoing disclosure obligations, the Prosecution has identified 24 pre-interview assessments for non-incriminating witnesses and screened or contacted persons, which contain PEXO or Rule 77 information material to the preparation of the Defence. These documents have also been included in Annex A and will be disclosed to the Defence.

24. Consequently, the Prosecution has discharged its disclosure obligations under the Court's legal regime. Although the Chamber has the ultimate authority to decide what constitutes PEXO, the Defence has failed to make a compelling factual showing to trigger any sort of judicial review under Article 67(2) of the Statute.<sup>18</sup>

To consider that the Prosecution did not proceed with a "complete and loyal" disclosure if he is not able to produce and disclose to the Defence all the pre-interview assessments of its incriminating witnesses

25. The Prosecution has acted in good faith and conducted its investigations and disclosure obligations in accordance with the relevant provisions of the Court.<sup>19</sup> It is not under an obligation to conduct pre-interview assessments of its witnesses, let

<sup>18</sup> See, *The Prosecutor v. Blaskic* (Case no. IT-95-14), Decision on the Production of Discovery Materials, 27 January 1997, para. 49, where the Chamber stated that "after having previously shown that they are in the possession of the Prosecutor, the defence must present a *prima facie* case which would make probable the exculpatory nature of the materials sought".

<sup>19</sup> See particularly, Articles 54 and 55, and Rules 76 and 77.

alone do so for all of its incriminating witnesses. The Defence has failed to lay a compelling foundation to show that the Prosecution has been incomplete and disloyal in discharging its disclosure obligations.

## **V. Conclusion**

26. The Prosecution has not disclosed pre-interview assessments of its incriminating witnesses because they are not “prior statements made by those witnesses”,<sup>20</sup> but rather the investigator’s opinion of the type of information witnesses can provide. Furthermore, Rule 111 of the Rules gives a clear indication of the fundamental ingredients of a “statement” that should be attributed to a witness. The Defence has failed to provide any sufficient basis to support a contrary interpretation.

27. The Prosecution will disclose pre-interview assessments of witnesses, non-witnesses, and persons screened or contacted during investigations where they contain PEXO or Rule 77 information material to the Defence that is not otherwise available to the Defence.<sup>21</sup>

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<sup>20</sup> Rules 76(1) and 76(2).

<sup>21</sup> The Prosecution will apply very minimal redactions to protect the witnesses’ and family members’ security and privacy, and are limited to the specific location of their residence, similar to its previous application in ICC-01/05-01/08-572-Conf-Exp + Conf-Exp-Anxs and in line with the Chamber’s subsequent decision in ICC-01/05-01/08-590.

**VI. Relief Sought**

28. In light of the foregoing, the Prosecution respectfully requests the Chamber to dismiss the Defence Request.



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**Luis Moreno-Ocampo, Prosecutor**

Dated this 26<sup>th</sup> day of February 2010

At The Hague, The Netherlands