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**International
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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***

**Confidential Document
With
Confidential Annex A**

Prosecution Response to “Defence Motion Regarding Prosecution Disclosure”

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Jean-Pierre Bemba Gombo

Mr. Aimé Kilolo Musamba

Mr. Peter Haynes

Legal Representatives of Victims

Ms. Marie-Edith Douzima Lawson

Mr. Zarambaud Assingambi

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

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Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence seeks three orders from the Trial Chamber III ("Chamber"): (i) to compel the Office of the Prosecutor ("Prosecution") to "conduct a full review of all relevant databases and archives" for purposes of locating all additional disclosable material in its possession by 31 August 2012; (ii) to compel the Prosecution to "formally certify that it has fully complied with its disclosure obligations by 31 August 2012"; and (iii) to preclude the Prosecution from "using or relying on any undisclosed material in its possession as at 31 August 2012 in the present proceedings" ("Defence Request").¹

2. To the extent that the Prosecution understands the Defence Request, it opposes it on the grounds that the Request is illogical, unnecessary, predicated on misguided submissions, and inconsistent with previous decisions of this Court. The Defence Request seems to suggest that the Prosecution should be barred from conducting ongoing searches through its collected materials to seek to locate and offer into evidence information that might be material to the preparation of the defence, intended for use by the Prosecution or, in the worst circumstance, even exculpatory. If that is its intent, the Request is both self-defeating and contrary to express legal provisions and jurisprudence of this Court that recognizes the ongoing nature of the Prosecution's obligation under Rule 77 of the Rules of Procedure and Evidence ("Rules") to provide evidentiary information and potentially exculpatory evidence pursuant to Article 67(2) of the Rome Statute ("Statute").

3. The Defence Request is also predicated upon an assumption that the Prosecution has deliberately or negligently withheld information in its possession that it should have known would be either exculpatory or material to the preparation of the defence. As its example, it cites the late disclosure of two video-recordings of

¹ ICC-01/05-01/08-2269-Conf, Defence Motion Regarding Prosecution Disclosure, 17 August 2012, para. 21.

interviews of the Accused himself (and about which the Accused both knew and, because one was publicly available and collected this month, the Defence would have been able to obtain on its own behalf if it so chose).² The failure to disclose these earlier, according to the Defence, denied the Defence access to exculpatory evidence or information material to the preparation of its case and reflects the nature of the Prosecution's ongoing disregard of its obligations.³ These examples are not only frivolous, the Chamber already rejected the Defence complaint about them.⁴

4. The Defence Request also fails to understand that the apparent relevance of materials can evolve as the proceedings unfold. This is particularly true of information that may be "material to the preparation of the defence"; unless the Defence specifies what the defence is, or what information it might seek, the Prosecution can only use its best judgment as to what might be material. Notably, the Defence was invited to provide additional search terms or information to assist and did not do so. And it refused to identify its prospective witnesses until it was ordered to produce the list by 13 July 2012, and its summary of their anticipated testimony is sketchy. By refusing to provide this essential information earlier, the Defence deprived the Prosecution of the ability to fully anticipate what additional evidentiary material currently in its possession would be material to the Defence case and disclosable under Rule 77 of the Rules, or to anticipate what information it possesses that affects the credibility of Defence evidence and that may therefore be disclosable under Article 67 of the Statute.

5. The Defence Request equally fails to appreciate the right and interest of the Prosecution in continuing its investigation into the Defence case. The Chamber's ruling and other jurisprudence allow the Prosecution to investigate, with the

² ICC-01/05-01/08-2269-Conf, para. 16.

³ ICC-01/05-01/08-2269-Conf, paras. 12 to 14.

⁴ ICC-01/05-01/08-T-232-CONF-ENG ET, 17 August 2012, p. 45, line 19 to p. 49, line 18.

assumption that the Prosecution will thereafter disclose material that it does not yet possess or information whose relevance is not yet apparent.

6. Finally, the Chamber has already ruled that, with respect to Rule 77 information and potentially exculpatory evidence, the Prosecution should “disclose any such items that are identified for disclosure or inspection during the Defence presentation of evidence *promptly upon their identification*”.⁵ [Emphasis added] Thus, the Defence Request in effect seeks reconsideration of these rulings, but without any justification, based on new information or arguments not considered by the Chamber, to demonstrate that the process in place is inadequate. It also ignores that the Chamber retains the power to take measures to ensure that proceedings are fair and the Defence right to adequate time and facilities to prepare its case is not prejudiced by delayed disclosure, on a case-by-case assessment. The draconian remedy of excluding all potential evidence for the remainder of the trial if it is not disclosed by 31 August 2012 is thus contrary to the previous judicial orders, obstructive to the Chamber’s duty to discover the truth, and unnecessary to protect the rights of the Accused.

II. Background

7. On 19 November 2010, the Chamber rendered a decision setting out the directions for the conduct of proceedings at trial.⁶ It ruled, *inter alia*, that the “if the defence wishes to use documents when questioning a witness called by the prosecution, it must, at least three working days before questioning the witness, provide the Trial Chamber, the prosecution and the legal representatives with a list

⁵ ICC-01/05-01/08-T-232-CONF-ENG ET, 17 August 2012, p. 48 and ICC-01/05-01/08-2141, Decision on defence disclosure and related issues, 24 February 2012, para. 31.

⁶ ICC-01/05-01/08-1023, Decision on Directions for the Conduct of Proceedings, 19 November 2010.

of documents it intends to use.⁷ The same regime was endorsed by the Chamber for the Prosecution during the Defence Case.⁸

8. On 13 July 2012, the Prosecution received the "Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case", by which the Defence submitted an outline of the legal and factual elements of their case.⁹ On that same day, the Defence disclosed witness summaries of its witnesses that provided general thematic issues for each witness and how those issues relate to the charges without providing any information or summary of what these witnesses may actually say.¹⁰

9. On 14 August 2012, the Prosecution disclosed 10 items to the Defence that it intended to use in examining the Defence expert witness. These 10 items consisted of two audio items with their related transcriptions and translations. As the Defence describes it, these included an audio interview with the Accused, on or about 12 March 2003, in which the Accused admitted that he had sent troops (whom he was now withdrawing) to fight alongside Central African forces defending President Patasse and another clip in which the Accused acknowledged he had been credited with responsibility for crimes, denied that he was responsible, and explained that he had requested a United Nations investigation.¹¹ On 16 August 2012, the Defence objected and the Prosecution responded on the issue of newly disclosed items of evidence that the Prosecution intended to use in court.¹² The Chamber rejected the Defence objection, thereby allowing the Prosecution to use the evidence.¹³

⁷ *Ibid*, para. 16(ii).

⁸ ICC-01/05-01/08-2141, paras. 21(b) and 31.

⁹ ICC-01/05-01/08-2243-Conf, Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case, 13 July 2012, para. 26; and ICC-01/05-01/08-2243-Conf-AnxA.

¹⁰ ICC-01/05-01/08-2245 + Conf-AnxA, *Communication par la Défense des documents divulgués au Bureau du Procureur pour pré-inspection en vertu de la Règle 78 du Règlement de Procédure et de Preuve*, 13 July 2012.

¹¹ ICC-01/05-01/08-2269-Conf, para. 16.

¹² ICC-01/05-01/08-T-231-CONF-ENG ET, 16 August 2012, p. 63, line 7 to p. 67, line 8.

¹³ ICC-01/05-01/08-T-232-CONF-ENG ET, 17 August 2012, p. 45, line 19 to p. 49, line 18.

10. This Defence Motion, predicated upon its complaint about the audio items that the Chamber previously rejected, followed.

III. Request for confidentiality

11. Pursuant to Regulation 23(1) *bis* of the Regulations of the Court ("Regulations"), the Prosecution files this document and the list of authorities (Annex A) as "Confidential" to maintain the classification awarded by the Defence. The Prosecution would not object to a change in classification.

IV. Submissions

12. Pursuant to Articles 64(2), 64(9)(a), 67(1)(b), 67(2) and 69(4) of the Statute, and Rules 77 and 140 of the Rules, the Prosecution submits that the Defence Request should be rejected in its entirety.

13. Throughout the proceedings in this case, the Prosecution has effected its disclosure obligations in good faith and in accordance with the established legal regime. In this regard, the Prosecution has searched through and disclosed incriminating as well as potentially exculpatory evidence and Rule 77 information from multiple databases maintained by the Prosecution, for the Central African Republic Situation and other situations.¹⁴ In an effort to ensure that it was able to capture all material that might be exculpatory or "material to the preparation of the defence", in September 2008 - four years ago - it also provided the Pre-Trial Chamber III and Defence with the categories of potentially exculpatory and Rule 77 information it had identified, to enable the Defence to suggest additional categories or search criteria to ensure a more comprehensive disclosure.¹⁵

¹⁴ See, for example, documents disclosed in Batch 1 on 1 October 2008 (ICC-01/05-01/08-133-Conf-AnxA) and Batch 2 on 3 October 2008 (ICC-01/05-01/08-138-Conf-AnxA).

¹⁵ ICC-01/05-01/08-90, Prosecution's Request for a Status Conference and Submissions on Criteria for Identifying Evidence pursuant to Article 67(2) and Rule 77, 4 September 2008.

14. Following the Defence disclosure of its witness names on 13 July 2012, and in accordance with its ongoing obligations to disclose evidence as soon as practicable after identification, the Prosecution undertook a new search and review, which remains ongoing, of all its databases in order to disclose information that newly appears to be material to the preparation of the defence, in light of the further details provided, as well as potentially exculpatory evidence that may be related to the new Defence witnesses or impeaching material that it may wish to use at trial.

15. In short, the Prosecution has been cognizant of and has acted in accordance with its obligations from the outset, and it continues to meet those obligations. The accusations that the Prosecution has engaged throughout the trial in bad faith or deliberate withholding of exculpatory evidence or information that was “material to the preparation of the defence” are unfounded and untrue.

16. As to the remedy sought by the Defence, it makes no sense to prohibit the Prosecution, in the context of the Defence case, from disclosing and introducing incriminating, exculpatory, impeaching, or otherwise material evidence because of a failure to previously disclose the evidence at a time when its value or relevance was not apparent, or because it did not previously possess the evidence. In addition, it is manifestly unfair and contrary to the discovery of the truth as applied to information that bears on the Defence case.

17. On the first point, Article 67(2) of the Statute expressly states that potentially exculpatory evidence shall be disclosed “as soon as practicable”, whilst the Defence accepts that the jurisprudence from Chambers of this Court have ruled that Rule 77 material should similarly be disclosed as soon as practicable.¹⁶ The Defence Request

¹⁶ ICC-01/05-01/08-2269-Conf, para. 9 quoting ICC-01/09-02/11-64, Decision on the “Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge” and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, paras. 20-21 and ICC-01/09-01/11-62, Decision on the “Prosecution's application requesting disclosure after a final resolution of the Government of

fails, however, to understand the rationale behind the ongoing nature of the Prosecution's obligation to disclose potentially exculpatory and Rule 77 information. Cases can evolve, and when they do so the apparent relevance of documents may change. A document that may not have appeared to be material to the preparation of the defence, or impeaching of a possible defence, can become material or impeachable as new theories of defence emerge or specifics of witness testimony become apparent. Equally, evidence that may have been incriminating and cumulative of other incriminating evidence - the Accused's taped admissions, for example - may later appear additionally to be material to the preparation of the defence or useful as potential examination of a particular Defence witness. Indeed, in some circumstances, the potential relevance of a piece of evidence may only become obvious during the witness's testimony.¹⁷

18. Nor is it fair or reasonable to demand that the Prosecution be barred from using any information that was not disclosed by the proposed 31 August 2012 deadline, during its examination of any of the remaining 62 Defence witnesses. For one, this request is contrary to the Chamber's previous decision that the Prosecution shall "disclose any items that are identified for disclosure or inspection during the defence presentation of evidence promptly upon their identification".¹⁸ The Defence Request also contradicts the practice in the *Lubanga* and *Katanga/ Ngudjolo* Cases.

19. In fact, the practice from the *Lubanga* and *Katanga/ Ngudjolo* Cases show that Trial Chambers I and II have allowed ongoing disclosure and tendering of relevant documents by the Prosecution during the Defence case.¹⁹ That practice also refutes

Kenya's admissibility challenge" and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, paras. 20-21; ICC-01/05-01/08-750-Conf, Decision on the Defence request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, para. 34.

¹⁷ ICTY, *Prosecutor v. Popovic et al.*, Transcript of hearing of 21 October 2008, IT-05-88, p. 27156 where the Chamber recognized that the Prosecution could not be restricted from using documents not listed for cross-examination if the need for such document arises out of the examination-in-chief or testimony of the witness.

¹⁸ ICC-01/05-01/08-2141, para. 31.

¹⁹ ICC-01/04-01/06-T-114-CONF-ENG, 3 February 2009, p. 67, line 24 to p. 68, line 4: "... if there are documents which you believe are relevant to a witness's testimony, it would be helpful, I think, if you could alert

the Defence concern that “the Prosecution’s assertion that it has a ‘right’ to use material which has only been disclosed to the Defence at the last moment will inevitably lead to unnecessary repetitive litigation over the use of new documents for the examination of witnesses during the Defence case”. Various rulings by different Chambers, including Trial Chamber III, allow new documents to be disclosed and put on a list of documents three working days prior to their use in court provided that the Defence has not been unfairly prejudiced as a result.²⁰ This is true even if the Prosecution has uncovered new exculpatory or material-to-the-preparation-of-the-defence information in the course of investigating the Defence case. In such an instance, it also must disclose that as soon as practicable, with the Chamber retaining the authority to take measures to protect the Defence rights; the remedy is not a blanket order in advance denying the Prosecution the ability to disclose and use it at all.

20. The Prosecution can only fully identify disclosable documents that are material to the preparation of the defence, including as impeachment of potential Defence evidence, if it has full information as to the theory of the Defence and the identity and anticipated contribution of proposed Defence witnesses. The more information or detail the Prosecution has, the better equipped it is to identify its disclosable material. Had the Defence wanted to receive all information related to its

the Defence sufficiently in advance so that they can look at them, and we will return in due course once this witness evidence is completed to see whether it’s right for this to be given an evidence number rather than any ... rather than an MFI number.”; *see also* ICC-01/04-01/06-1140, Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, para. 34: “However, the Chamber recognises that the questioning of a witness by a party not calling that witness is to some extent reactionary, and as such could entail on occasion the unanticipated use of documents.”; ICC-01/04-01/06-2624, Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses, 12 November 2010 quoting ICC-01/04-01/06-1140, Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, para. 34: “... questioning, as the Chamber has previously underlined, may to some extent be reactionary, and the answers from witnesses may reveal additional material that is relevant and disclosable.”; *see also* ICC-01/04-01/07-1665-Corr, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, para 108: “If a cross-examining party knows in advance that it will make reference to a document that is not already in evidence during cross examination of a particular witness, it must inform the Chamber and the Court Officer at least three (3) full working days before the scheduled hearing and provide it in electronic form, in accordance with regulation 52(2) of the Regulations of the Registry.”

²⁰ ICC-01/05-01/08-2269-Conf, para. 20; and ICC-01/05-01/08-T-232-CONF-ENG ET, 17 August 2012, p. 48, line 25 to p. 49, line 18.

upcoming witnesses currently within the Prosecution's possession prior to the commencement of its case, for example, it should have disclosed this information with sufficient detail earlier than 13 July 2012 to allow the Prosecution to review all its databases. It did not do so. It thus cannot complain that the Prosecution failed in its obligation to anticipate or predict the Defence case by not disclosing all potentially relevant evidence prior to the start of the Defence Case.

21. Moreover, once the Defence case is revealed, the Chamber recognized, the Prosecution's preparation for this phase of the trial may include investigation and collection of relevant information regarding prospective Defence witnesses.²¹ Even assuming that the Defence provided a wealth of detail regarding its upcoming witnesses sufficient for the Prosecution to conduct precisely focused investigations, the Prosecution cannot be expected to have concluded those investigations into the Defence case within six weeks of receiving the names of its 63 witnesses, nor to have collected and analysed all relevant information to examine all Defence witnesses, particularly those not expected to testify until sometime next year. Thus it is impossible for the Prosecution to formally certify that it has fully complied with disclosure obligations that are essentially ongoing.

22. The proposal will also not enhance the fair and expeditious conduct of proceedings or ensure pertinent disclosure that will assist the Defence as well as the Chamber. Indeed, the Defence Request will have the converse effect. Precluding additional disclosure of Rule 77 information intended for use by the Prosecution will either foreclose the ability to use this information at all, thus depriving the trial of potentially essential evidence, or require the Prosecution to make numerous applications under Regulation 35(2) of the Regulations. As to the latter, presumably this Chamber sought to avoid this burden on itself and the parties by providing for a

²¹ ICC-01/05-01/08-2236-Conf, Decision on the "Defence Request for Delayed Disclosure of Witness Identifying Particulars and Summaries of Anticipated Testimony, and other Related Requests", 27 June 2012, para. 24.

more efficient and balanced three-day notice period whilst preserving its power to rule on the use or admissibility of such material. This regime was implemented throughout the Prosecution's case as it provided adequate notice to the opposing party and assisted the Chamber's ability to determine the truth. To change this regime now would be prejudicial to the Prosecution and to the Chamber's same truth-seeking capability. Alternatively, requiring the Prosecution to disclose all possible Rule 77 and potentially exculpatory material that is currently in its possession would result in a "document dump" on the Defence itself, with huge amounts of largely irrelevant material being produced now in order that the Prosecution preserves its ability to use evidence that may become relevant during the Defence case. This would not only overwhelm the Defence, it would lead to unfocussed and inefficient disclosure of evidentiary material and unnecessary delays in the proceedings. Thus not only would the Defence Request violate express provisions and established jurisprudence and practice in this Court, it would adversely affect the management of trial proceedings with marginal benefit, if at all.

23. Finally, the Chamber has a number of measures at its disposal to ensure that the Prosecution's ongoing disclosure obligations do not prejudice the fairness of proceedings or unfairly restrict the Defence right to adequate time and facilities for its preparation. The Defence itself has recognized that "[t]he Chamber must consider *a remedy that is appropriate in the circumstances* of this case and that preserves the integrity of the judicial process. In that respect, *a large number of remedial options are available to the Chamber.*"²² [Emphasis added]

24. This Chamber implicitly acknowledged the necessity for a case-by-case approach when it recently decided that "[i]n these specific circumstances, the Chamber's therefore not persuaded that the Defence suffered an unfair prejudice as

²² ICC-01/05-01/08-2269-Conf, para. 11 quoting *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Defence motions Alleging Violation of the Prosecutor's Disclosure obligations Pursuant to Rule 68, 22 September 2008, para. 61.

the Defence has at least three working days to prepare, as specifically established by the Chamber's decision 2141 at paragraph 21(b)" and found that "the Defence has not been unfairly prejudiced by the delayed disclosure ..." ²³ Additionally, the Chamber will rule separately on the admissibility or relevance of evidence during the course of the proceedings. In light of the possibility of bringing specific challenges on a case-by-case basis that may result in the exclusion of items disclosed late on grounds of unfair prejudice, the Defence Request is general, unwarranted and in clear violation of the legal regime of this Court.

V. Conclusion

25. For the reasons set out above, the Prosecution respectfully requests the Chamber to reject the Defence Request in its entirety.



Fatou Bensouda, Prosecutor

Dated this 23rd Day of August 2012

At The Hague, The Netherlands

²³ ICC-01/05-01/08-T-232-CONF-ENG ET, 17 August 2012, p. 48, line 25 to p. 49, line 8.