

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 17 August 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 redacted

Defence Motion Regarding Prosecution Disclosure

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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(Participation/Reparation)

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States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. BACKGROUND

1. On 7 October 2009, Trial Chamber III ('the Chamber') set **30 November 2009** as the deadline for disclosure of evidence by the Prosecution in the present proceedings.¹

2. On 18 November 2009, the Prosecution confirmed that it had 'discharged its disclosure obligations in a timely manner in accordance with the Statute, the Rules and in compliance with the timetables set out in the various decisions of the Chamber.'²

3. On 22 November 2010, although not obliged to do so, the Defence made an Opening Statement in which it set out in detail the Defence case.³ The Defence case was consistently reiterated between November 2010 and May 2012, through its cross-examination of both Prosecution witnesses and witnesses called by the Legal Representatives of Victims. If indeed there was any doubt as to the nature and detail of the Defence case, since 13 July 2012 the Prosecution has been in possession of the *Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case*,⁴ and a summary of the testimony of each of the witnesses to be called by the Defence.

4. On 14 August 2012, the Defence commenced the presentation of its evidence. Moments before the Judges entered the courtroom, the Prosecution disclosed ten items ('the Material') under Rule 77 of the Rules of Procedure and Evidence ('the Rules').⁵

¹ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 16, lines 1 to 6.

² ICC-01/05-01/08-262, para. 40.

³ ICC-01/05-01/08-T-32-ENG ET, at 50 - 60.

⁴ ICC-01/05-01/08-2243-Conf

⁵ ICC-01/05-01/08-2262-Conf-AnxA, signed on 14 August 2012.

5. The Material comprises a collection of audio and video material⁶. There is a reformatted version of the same material.⁷ A series of transcriptions of the various extracts have been simultaneously disclosed. The Prosecution asserts on the face of the Material that it is '**MIXD (Rule 77)**',⁸ in other words that it contains both inculpatory and exculpatory elements.

6. The source material came into the possession of the Prosecution on **6 October 2008**.⁹ Despite this, the Material was only disclosed on the morning of the commencement of the evidence of the witness with whom the Prosecution sought to use it.

B. APPLICABLE LAW

7. The following is required by Article 67(2) of the Statute of the International Criminal Court ('Statute'):¹⁰

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, **as soon as practicable**, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

8. Rule 77 of the Rules provides that

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

⁶ CAR-OTP-0031-0118

⁷ CAR-OTP-0068-0002

⁸ CAR-OTP-0031-0118

⁹ 2008-10-06:01 From: RADIO FRANCE INTERNATIONALE To: [EXPURGE]; 2008-10-06:02 From: [EXPURGE]; To: [EXPURGE]; (Disclosed chain of custody).

¹⁰ Emphasis added.

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.

9. As regards the timing of Rule 77 disclosure, the practice of the ICC mandates that this disclosure also be affected as soon as practicable. Most recently, the Chamber in the *Muthaura & Kenyatta*, and *Ruto & Sang* cases held as follows:¹¹

even though the Statute or the Rules do not provide for any explicit deadline, the Prosecutor nevertheless is instructed by law to disclose to the Defence any piece of evidence falling within the scope of article 67(2) of the Statute or rule 77 of the Rules **as soon as practicable**. In this regard, the Single Judge assumes that the Prosecutor, being cognizant of his duties as provided in the statutory documents of the Court and with the awareness of the rights of the Defence teams to have adequate time for a meaningful preparation of their case, will comply with the obligations vested on him to disclose any such evidence as soon as practicable, i.e. immediately after having identified any such evidence, and on a continuous basis.’

10. As previously held in this case, ‘the twin duties of disclosure (Article 67(2) of the Statute) and permitting inspection (Rule 77 of the Rules) [...] are important prosecutorial obligations, which must be discharged scrupulously and fairly.’¹²

11. The determination of a suitable remedy for late disclosure of exculpatory material falls within the Chamber’s inherent power and responsibility to ensure a fair trial:¹³

The 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. These include recalling relevant prosecution witnesses for further cross-examination,

¹¹ ICC-01/09-02/11-64, para. 20-21; ICC-01/09-01/11-62; para. 20-21.

¹² ICC-01/05-01/08-632, para. 22.

¹³ *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

allowing the Defence teams to call additional defence witnesses, excluding relevant parts of the prosecution evidence, drawing necessary inferences from the exculpatory material, dismissing charges touched upon by the exculpatory material, and ordering a stay of proceedings. In determining which of these remedies is the most suitable the Chamber must take into account the nature and significance of the Prosecution's violations in light of the current stage of proceedings, the rights of the Accused, there need to preserve the integrity of the proceedings, and its obligation to discover the truth [...]'

C. SUBMISSIONS

(a) Late Disclosure of the Material on 14 August 2012

12. By the Prosecution's own admission, the Material disclosed on 14 August 2012 contains both exculpatory and inculpatory elements.¹⁴ The Prosecution has thus disclosed material containing exculpatory elements **nearly four years after having received it**. This cannot be reconciled with the Prosecution's disclosure obligations under the Statute, Rules and jurisprudence outline above, notably its duty to disclose exculpatory material 'as soon as practicable' under Article 67(2).

13. The late disclosure of the Material has caused prejudice. The Defence has been prevented from using the Material in its examination of any Prosecution witnesses. It has been prevented from providing it to its experts for their commentary, or for use in the preparation of their reports. It has been prevented from discussing the Material with its witnesses during prolonged periods of Defence investigations. It has also been prevented from undertaking any meaningful review of the Material and seeking instructions from the client prior to the commencement of the presentation of the Defence case.

¹⁴ CAR-OTP-0031-0118, which lists the Material as MIXD (Rule 77).

(b) Implications for the Remainder of the Defence Case

14. The Defence had assumed that this breach on the part of the Prosecution was an isolated oversight, rather than a deliberate strategy to hold back material until the eve of examination of Defence witnesses. This assumption is difficult to reconcile with the Senior Prosecution Trial Attorney's justification of the Prosecution's conduct:¹⁵

[EXPURGE];

[EXPURGE];

EXPURGE];

[EXPURGE]; [

EXPURGE];

[EXPURGE];

[EXPURGE];.

15. This position is extremely problematic when viewed against the obligations placed on the Prosecution under the Statute and Rules. Firstly, the Prosecution disclosed the Material as '**MIXD (Rule 77)**'.¹⁶ The heading of the table of disclosed documents was '*Disclosure of Trial Rule 77 Evidence – Rule 77 – Batch 61*'.¹⁷ This cannot be reconciled with the Senior Trial Attorney's statement that 'we do not consider it to be Rule 77'.¹⁸

16. Indeed, even a cursory glance at the material reveals the high degree of its pertinence. In one audio clip, an apparent interview with the accused on or about 12

¹⁵ ICC-01/05-01/08-T-231-CONF-ENG ET 16-08-2012 66/67

¹⁶ CAR-OTP-0031-0118

¹⁷ ICC-01/05-01/08-2262-Conf-AnxA

¹⁸ ICC-01/05-01/08-T-231-CONF-ENG ET 16-08-2012 66/67

March 2003,¹⁹ he avers that the MLC troops were fighting alongside Central African forces defending President Patassé but were withdrawing leaving the Central Africans to defend their own country. In a second clip, apparently recorded about a year later,²⁰ he denies responsibility for commission of any crimes in the CAR, and avers that he has written to the United Nations, inviting them to carry out an inquiry into the allegations broadcast in the media. In the submission of the Defence, there is no sensible construction of the Statute or the Rules which could lead anybody to conclude that such material was not disclosable as either 'tend[ing] to show the innocence of the accused' and/or 'material to the preparation of the defence'.

17. Secondly, the argument that 'even the Defence did exactly the same'²¹ is not only factually incorrect²² but demonstrates an alarming misunderstanding of the difference between the disclosure obligations which the drafters of the Rome Statute placed upon the parties.²³

18. Lastly, and looking towards the future conduct of the proceedings, the Prosecution has an obligation to disclose materials that are 'intended for use by the Prosecutor as evidence' which should be carried out as soon as practicable.²⁴ The Prosecution has a duty 'as provided in the statutory documents of the Court and with the awareness of the rights of the Defence teams to have adequate time for a meaningful preparation of their case, [to] comply with the obligations vested on [it] to disclose any such evidence as soon as practicable, i.e. immediately after having identified any such evidence, and on a continuous basis.'²⁵

¹⁹ See CAR-OTP-0066-0304

²⁰ See CAR-OTP-0066-0327

²¹ ICC-01/05-01/08-T-231-CONF-ENG ET 16-08-2012 66/67

²² [EXPURGE];

²³ ICC-01/05-01/08-T-231-CONF-ENG ET 16-08-2012 66/67

²⁴ See 'Applicable Law' above.

²⁵ ICC-01/09-02/11-64, para. 20-21; ICC-01/09-01/11-62; para. 20-21.

19. Even if the Chamber accepts that ‘it is impossible for the Prosecution to anticipate in 2008 which witnesses the Defence may call and which additional material the Prosecution may use’,²⁶ 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 2012.²⁷ What was allegedly ‘impossible’ in 2008 is now demonstrably possible.

20. The concern of the Defence is 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. To that end, in order to avoid further prejudice such as that which arose out of the 14 August disclosure, and in order to facilitate future management of the trial, the Defence seeks the remedies set out below.

D. RELIEF REQUESTED

21. Given the reasons cited above, the Defence respectfully requests that the Chamber:

ORDER 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;

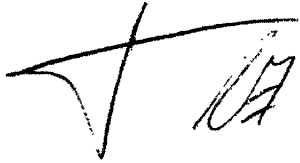
ORDER the Prosecution to formally certify that it has fully complied with its disclosure obligations by 31 August 2012; and

²⁶ ICC-01/05-01/08-T-231-CONF-ENG ET 16-08-2012 66/67

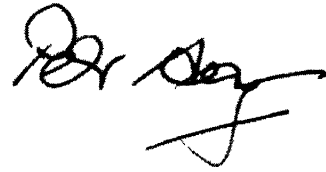
²⁷ ICC-01/05-01/08-2243-Conf

ORDER that the Prosecution be precluded from using or relying on any undisclosed material in its possession as at 31 August 2012 in the present proceedings.

The whole respectfully submitted.



Aimé Kilolo Musamba
Lead Counsel



Peter Haynes
Co- Counsel

Done on the 17th of August 2012
At The Hague, The Netherlands