

**Cour
Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRALAFRICANREPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

Confidential

Consolidated Prosecution Response in Opposition to “Defence Request for Disclosure” and “Defence Further Request for 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

Ms Fatou Bensouda

Mr James Stewart

Mr Jean-Jacques Badibanga

Counsel for the Defence of Jean-Pierre

Bemba Gombo

Mr Peter Haynes

Ms Kate Gibson

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the *Defence Request for Disclosure*¹ ("Defence Request" or "Request"), which requests Trial Chamber III ("Chamber") to compel the Prosecution to disclose two categories of information: i) the Defence seeks to compel the Prosecution to answer a list of questions ("interrogatories") pertaining to information about on-going Article 70 investigations in *Prosecutor v. Bemba et al.*; and ii) the Defence seeks all "copies of any correspondence, minutes or *procès verbaux*" related to the Prosecution's requests for assistance ("RFAs") to the Democratic Republic of the Congo ("DRC") in matters pertaining to the Defence case.

2. The Chamber should reject the Defence Request as the information requested does not contain any items under Article 67(2) of the Rome Statute ("Statute") and is not material to the preparation of the Defence under Rule 77 of the Rules of Procedure and Evidence ("Rules"). Rather the Defence Request is a thinly-veiled attempt to prematurely discover confidential information about the Prosecution's on-going investigation of Article 70 offences; *e.g.* the identities of former Defence witnesses who are cooperating with the investigation. This information has been and will be disclosed to the Defence teams and suspects, including Mr. Bemba, in the Article 70 proceedings in accordance with the scheduling orders of Pre-Trial Chamber II. As the Chamber has now rejected the Prosecution's request to submit evidence from its Article 70 investigation, none of the information pertaining to Article 70 investigations is material to the preparation of the Defence.²

3. Further, the Defence Request to compel the production of all documents related to the Prosecution's RFAs is unsubstantiated and fails to establish *prima facie* that the

¹ ICC-01/05-01/08-3020-Conf, Defence Request for Disclosure, 20 March 2014.

² ICC-01/05-01/08-3029, Decision on "Prosecution's application to submit additional evidence", 2 April 2014.

information sought is material to the preparation of the Defence.³

4. Lastly, the Chamber should reject the *Defence Further Request for Disclosure*⁴ ("Further Request"), which requests the Chamber to compel the Prosecution to disclose potentially exonerating materials related to Narcisse Arido, a suspect in the Article 70 proceedings. Nothing in the materials related to Narcisse Arido bears on any Article 67(2) or Rule 77 matter for the Accused in this case and is thus not subject to disclosure in this case.

II. Request for Confidentiality

5. Pursuant to Regulation 23(2)*bis* of the Regulations of the Court, the Prosecution files this response as "Confidential", as it refers to the Defence Request of the same classification.

III. Procedural History

6. Since 16 January 2014, the Defence in this case has written no fewer than 15 letters to the Prosecution seeking information on the Prosecution's investigation of Article 70 offences.

7. On 12 February 2014, the Defence filed similar disclosure requests in ICC-01/05-01/08-2971-Conf, *Defence Motion on Prosecution contact with its witnesses*.

8. On 20 March 2014, the Defence filed ICC-01/05-01/08-3020-Conf, *Defence Request for Disclosure*.

³ See ICC-02/05-03/09-501 OA4, 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, 28 August 2013, para. 42 ("Banda Appeals Decision").

⁴ ICC-01/05-01/08-3033-Conf, *Defence Further Request for Disclosure*, 7 April 2014.

9. On 7 April 2014, the Defence filed ICC-01/05-01/08-3033-Conf, *Defence Further Request for Disclosure*.

IV. Submissions

The Chamber's rejection of the Prosecution's request to submit evidence from the Prosecution's investigation of Article 70 offences renders information from the Prosecution's investigation immaterial to these proceedings and to the Defence's preparation

10. The information requested in the Defence Request pertains solely to the Article 70 proceedings of *Bemba et al.* and not to these proceedings. The interrogatories set out in the Defence Request are meant to discover information relating to the Prosecution's Article 70 investigation in *Bemba et al.* For instance, the Defence seeks information on the identity of interviewed witnesses in the Article 70 investigation, the procedure used to question the witnesses, and circumstances of the interviews. As such, these requests are manifestly outside the scope of the Bemba case and impermissibly seeks to intrude into the record and evidence of a separate case, which is handled independently by the Court and involves a separate defence team. The Prosecution recognizes that it sought admission of a confined pool of evidence emanating from the Article 70 case into the instant proceedings; however (a) this request, if granted, would have, at best, entitled the defence to have access only to material undercutting any evidence admitted by the Chamber, or enabling the Defence to react to such evidence, and, more importantly (b) since the Chamber rejected the Prosecution's attempt to submit evidence from its Article 70 investigations, none of the corresponding information about such evidence now has any material bearing on any contestable issue arising in these proceedings.

11. The Defence Request is premised on the flawed assumption that the Chamber

would accept evidence from the Prosecution's Article 70 investigation. Since such evidence will not form part of the body of evidence considered by the Chamber during deliberations, none of the information sought bears on any issue in these proceedings and none of the information is material for the Defence's preparation of the remaining tasks of the case, especially at this late stage.

12. Rule 77 requires that the Prosecution permit the Defence to inspect "any books, documents, photographs and other tangible object in the possession or control of the Prosecutor, which are material to the preparation of the defence". The Prosecution must allow for inspection where there is a *prima facie* basis for inspection (or, as is the practice, disclosure)⁵ and Rule 77 should be read broadly to encourage disclosure.⁶

13. As this Chamber is aware, the Single Judge of Pre-Trial Chamber II authorised the Prosecution's contact with Defence witnesses in these proceedings for the purpose of its Article 70 investigations.⁷ The Prosecution has strictly adhered to this limitation. Additionally the Prosecution did not contact any Defence witness prior to the close of the Defence case.⁸ At this stage the evidence provided by these witnesses will not and cannot be used by the Prosecution in these proceedings. In short, much of the information sought by the Defence in these proceedings is, of course, material to the preparation of the Defence in *Bemba et al.*, but not these proceedings.

14. Additionally, the information relates to an on-going investigation into offences under Article 70 and has been or will be disclosed under the Prosecution's obligations in that case, where the Accused in this case is represented as a Suspect by counsel who is free to test, contest, and challenge the evidence in the course of the

⁵ Banda Appeals Decision, para. 42.

⁶ ICC-01/04-01/06-1433 OA11, *Judgment on Appeal against Oral Disclosure*, 11 July 2008, para. 78.

⁷ ICC-01/05-46, "Decision on the Prosecutor's 'Request for judicial assistance to obtain evidence for investigation under Article 70'", 8 May 2013, p. 8.

⁸ Issues related to such contact of persons who appeared as witnesses in these proceedings are currently the subject of litigation before this Chamber.

Bemba et al. proceedings. Should the Accused consider it necessary for his defence in these proceedings, he can make this information available to his counsel or inform his counsel sufficiently for his counsel to particularise his request for disclosure.

15. Finally, the Prosecution has already noted in public session that there is an apparent risk of a conflict of interests affecting current leading counsel and co-counsel stemming from the Article 70 inquiry, inter alia due to the fact that they were both members of the Defence team when the Article 70 offences were committed and accordingly may be called as witnesses in the Article 70 case.⁹ This means that absent compelling reasons, the fair and efficient conduct of this case actually strongly militates against this Defence team having access to the evidence obtained and disclosed in the Article 70 inquiry. And there is no such compelling reason. Rather, the Defence is inexplicably insisting in obtaining material that does not relate to the facts and circumstances of this case and in so doing, is disrupting the current proceedings and conspiring against their efficient and expeditious completion. In addition, the Defence has also attempted to use these proceedings to challenge the legality of the Article 70 case and/or to delay its progress, delving into matters for which this Trial Chamber lacks jurisdiction and this Defence team has no mandate. It is respectfully submitted that the Trial Chamber should put an end to this practice and direct the Defence to focus its efforts in timely finalising its closing submissions.

The Defence Request for any Prosecution RFAs to the DRC is unsubstantiated and such RFAs are immaterial to Defence preparation

16. The Defence Request fails to substantiate any basis to obtain Prosecution RFA's to the DRC in matters pertaining to the Defence. The Appeals Chamber has held that "the right to disclosure is not unlimited" and the application of Rule 77 depends on

⁹ ICC-01/05-01/08-T-359-ENG-ET, 28 November 2013, p. 7.

“the specific circumstances of the case.”¹⁰ The burden is on the Defence to establish the *prima facie* basis of the materiality to its preparation.¹¹

17. In this instance the Defence has failed to establish a *prima facie* basis for disclosure under Rule 77. In its submission, the Defence points out that in the past the Prosecution has, disclosed RFA's. However, each disclosure of an RFA depended on the circumstances in each case and the RFAs themselves were the subject of litigation that was envisioned by the parties.¹² The Defence also argues that since the requested RFA's pertain to the Defence case such RFAs are automatically material to the preparation of the Defence. Such a reading of Rule 77 would upend the Appeals Chamber jurisprudence and create the very unlimited disclosure of information that the Appeals Chamber warned against. Under the Statute, cooperation with States Parties is the routine method to conduct investigations. In this case, as in other cases, the Prosecution made use of RFAs in the context of judicial cooperation as authorized under Article 93. Though the resulting information from responses to RFAs may constitute evidence or may be material to the preparation of the Defence, RFAs do not constitute, in principle, evidence and are not generally material to the preparation of the Defence, unless specific circumstances are demonstrated in a request for disclosure. Nowhere in the Defence Request does the Defence explain in any concrete terms how it has established a *prima facie* basis for the information sought. The Request should therefore be denied.

18. The Defence also requests that the Chamber remain seized of the need to sanction the Prosecution by excluding incriminating material or charges or drawing inferences against the Prosecution in favour of the Defence. This Defence argument

¹⁰ Banda Appeals Decision, para. 39.

¹¹ Banda Appeals Decision, para. 42.

¹² See generally e.g. ICC-01/09-02/11-T-28-ENG ET, at p. 65, lines 4-11 (The Prosecution provided correspondence to the Government of Kenya to the Defence of Mr. Kenyatta since the issue of cooperation had become a live issue in the case). See also ICC-01/04-01/06-3017 A5 A6, *Decision on Mr Thomas Lubanga's request for disclosure*, 11 April 2013, para. 11 (noting that the RFA to be disclosed related to a letter pertaining to the determination of the ages of two individuals, an issue in material dispute in that case).

rests on the presumption that the Prosecution seeks to submit any of the information the Defence requests. It does not. The information the Defence requests is related entirely to the Article 70 proceedings where all the suspects are represented by counsel and will receive disclosure under the regulation of Pre-Trial Chamber II.

Potentially exonerating information disclosed to Narcisse Arido has no bearing on any issue in these proceedings and is not disclosable under Article 67(2) or Rule 77

19. The Further Request seeks to compel the disclosure of potentially exonerating evidence which relates to the suspect Narcisse Arido. However, the Defence incorrectly assumes that such Article 67(2) material bears on the alleged falsity of Defence documents or has a correlative bearing on Mr. Bemba's individual criminal responsibility in this case. The Defence assumption is wrong. The nature of the evidence disclosed to Mr. Arido does not concern the alleged falsity of Defence documents or Mr. Bemba; rather, the evidence concerns the strength of the Prosecution's evidence concerning Mr. Arido's consciousness of guilt and therefore bears on no live or contestable issue in these proceedings.

V. Relief Requested

20. The Prosecution respectfully requests that the Chamber deny the Defence Requests for Disclosure.



Fatou Bensouda, Prosecutor

Dated this 10th Day of April 2014
At The Hague, the Netherlands