



Original: **English**

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

Date: 06/07/2015

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
With Confidential Ex Parte Annexes A, B and C

Public Redacted Version of Further Defence Request for 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:*****The Office of the Prosecutor**

Fatou Bensouda, Prosecutor

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented****(Participation/Reparation)****Applicants****The Office of Public Counsel for the Victims**

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives**Amicus Curiae****REGISTRY****Registrar**

Herman von Hebel

Defence Support Section**Deputy Registrar****Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and Reparations Other
Section**

A. BACKGROUND

1. In the process of conducting investigations in case ICC-01/05-01/13 (“Article 70 Case”), the Prosecution carried out numerous interviews, and had numerous other contacts with several Defence witnesses who testified in the Main Case.

2. The Prosecution has periodically disclosed material in the Article 70 Case, which was generated during these contacts with Defence witnesses, or is directly relevant to their credibility. This material is disclosable in the Main Case. While some of it has been disclosed to the Defence, much of it has not.

3. The Defence has sought to resolve issues of non-disclosure *inter partes* rather than immediately seizing the Trial Chamber of the issue. However, none of its attempts have prompted the Prosecution to produce the material discussed below. Accordingly, the Defence is bound to seek orders for disclosure, in order to be in a position to review the material in question, and make further submissions on the impact of these Prosecutorial breaches on the conduct of the present proceedings and the rights of the accused.

B. APPLICABLE LAW

4. All information that undermines or supports the evidence, or the credibility, of proposed Defence witnesses falls within the scope of Rule 77 and must be disclosed.¹ This uncontroversial principle, which continues after the witnesses have testified, has been endorsed and applied by the Trial Chamber throughout the course of the instant proceedings.²

¹ ICC-01/04-01/06-2624, para. 18.

² ICC-01/05-01/08-1594, para. 17, citing *Prosecutor v. Lubanga*, ICC-01/04-01/06-1433, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 2; See also ICC-01/05-01/08-3070, para. 23 (“Decision 3070”).

5. In particular, the Trial Chamber has recently clarified that material generated during the course of contacts between the Prosecution and Defence witnesses must be disclosed to the Defence under Rule 77 of the Rules of Procedure and Evidence:³

... the Chamber notes that the defence requests inspection of "all interview notes, statements, or transcripts of interviews" generated during the course of contacts between the prosecution and witnesses called by the defence in the Bemba case. The Chamber finds that, in principle, the Items generated during the course of contacts between prosecution and witnesses called by the defence may be material to the preparation of the defence. However, in general terms, "interview notes" fall within the scope of Rule 81(1) of the Rules. However, the Chamber has previously held in relation to screening notes or investigator's notes that the prosecution's duties within the scope of Article 67(2) of the Statute and Rule 77 of the Rules require fact specific decisions for each interview note or pre-interview assessment, and "critically the prosecution must ensure that if there has been a later formal statement all exculpatory material in the screening notes has been disclosed within the statement, along with any information that is material to defence preparation. If this had not occurred, the prosecution must disclose the screening notes, or the relevant information."

C. SUBMISSIONS

(a) The Prosecution is required to disclose the interview records of [REDACTED]

6. [REDACTED].

7. [REDACTED].⁴ [REDACTED].⁵

³ ICC-01/05-01/08-3070, para. 25.

⁴ [REDACTED].

⁵ [REDACTED].

8. [REDACTED].⁶ [REDACTED].

9. [REDACTED].⁷ [REDACTED]. The Prosecution is accordingly in breach of its disclosure obligations under Rule 77 of the Rules.

10. [REDACTED]:⁸

[REDACTED].

11. Rather than applying to the Trial Chamber for authorisation for delayed or partial disclosure [REDACTED], the Prosecution made a unilateral decision to exempt itself from disclosure in the Main Case on the basis that delayed disclosure may **possibly** be ordered in the Article 70 Case. The Prosecution responded that '[REDACTED]'.⁹

12. The Prosecution's approach is misconceived. It does not have the right unilaterally to excuse itself from the obligations set down by this Trial Chamber to gain an advantage in other proceedings, or facilitate the presentation of its evidence in another case. The Prosecution remains answerable to the Trial Chamber in the present proceedings, where its disclosure obligations are ongoing, and absolute.

(b) The Prosecution is required to disclose the interview records of [REDACTED]

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

13. On 22 June 2015, following requests for disclosure from the Defence, the Prosecution disclosed interview records with [REDACTED].¹⁰ [REDACTED],¹¹ [REDACTED].¹²

14. The Prosecution has given no explanation for the 14-month delay in disclosure, [REDACTED]. Significantly, during the 14-month period between [REDACTED], the Prosecution has made repeated assertions, accepted by the Trial Chamber, that it has acted in full compliance with its disclosure obligations.¹³ This was simply not the case.

15. Despite the late disclosure of a significant number interview records, the Prosecution has yet to disclose any other items generated during its contacts with Defence witnesses, despite the Trial Chamber's ruling in Decision 3070. As such, the Defence wrote to the Prosecution requesting further disclosure:¹⁴

We note that yesterday's disclosure from the Prosecution contained the transcript of an interview between the Prosecution and a Defence witness in the Main Case, conducted **in October 2014**. As such, the Prosecution has been in possession of this material for eight months without disclosing it to the Defence, despite this material falling within the terms of decision ICC-01/05-01/08-3070.

We also note that the Defence has yet to receive any items generated during contact with Defence witnesses, apart from transcripts of interviews. The scope of decision 3070 is considerably broader.

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ See, for example, ICC-01/05-01/08-3039, paras. 2, 10; ICC-01/05-01/08-3229-Red2, para. 46; ICC-01/05-01/08-3255, para. 84: 'The Chamber notes that the relevant material was subsequently disclosed on 22 July 2014'; para. 85: 'In addition, while the Defence submits that "[k]ey material remains undisclosed'... the Chamber does not consider it possible to determine whether any such disclosable material remains undisclosed on the basis of the cited letter and as such finds the Defence's submissions speculative'.

¹⁴ Email Defence to Prosecution, 9 June 2015, at 16:35.

We therefore reiterate our request for immediate disclosure of all other materials in the Prosecution's possession generated during contact with Defence witnesses, by Monday, 14 June 2015.

16. The Prosecution responded that '[a]lthough we note the Defence query that it has yet to receive any items generated during contact with Defence witnesses apart from transcripts of interviews, we require further clarification of what information the Defence is seeking.'¹⁵ The Defence duly replied:¹⁶

we are requesting immediate disclosure of all material generated by the Prosecution during the course of this contact, including but not limited to all interview notes, statements, transcripts of interviews, audio and/or visual recordings of interviews, notes of telephone conversations, investigative notes to file, receipts, email correspondence and other related material.

17. Remarkably, the Prosecution responded that '[t]he Prosecution has disclosed the relevant material regarding contact with Defence witnesses in the context of the Article 70 case and will continue to do so as previously indicated. **Your detailed request below goes beyond the scope of the Chamber's order in Decision 3070.**'¹⁷ The Prosecution did not deny the existence of additional material. No further disclosure has been forthcoming.

18. Additional disclosable material undoubtedly exists. According to the Prosecution, there are reasonable grounds to believe that [REDACTED].¹⁸ Any interviews, accordingly, must have been audio or video recorded under Rule

¹⁵ Email Prosecution to Defence, 16 June 2015, at 15:54.

¹⁶ Email Defence to Prosecution, 16 June 2015, at 16:49.

¹⁷ Email Prosecution to Defence, 19 June 2015, at 15:25.

¹⁸ [REDACTED].

112(1) of the Rules. No disclosure of any audio or video recording has been made to the Defence.¹⁹

19. [REDACTED].²⁰ The Prosecution has failed to disclose any interview notes, statements, or transcripts of interviews concerning these (and any other) prior instances of contact, despite the statutory requirement under Rule 112(1) of the Rules that they be audio or video recorded.

20. The Prosecution's refusal to provide any material, other than the belated and piecemeal disclosure of transcripts of interviews after their disclosure in the Article 70 Case, must be viewed against numerous previous instances of the Prosecution's non-compliance with its disclosure obligations, recognised by the Trial Chamber;²¹ the concrete examples of this non-disclosure in the Main Case more recently brought to the attention of the Trial Chamber,²² and the fact that in none of the Prosecution's correspondence is the existence of additional material denied.

¹⁹ If the Prosecution asserts that no audio or video recordings are in existence, it is the Defence submission that the Prosecution should be ordered to provide an explanation as to why Defence witnesses were questioned as suspects without the benefit of their statutory rights.

²⁰ [REDACTED].

²¹ See, for example, ICC-01/05-01/08-2924-Red, para. 15: 'At the outset, and before considering the merits of the Defence Motion, the Chamber regrets that, after having received the specific communications from Witness 169, the prosecution waited for over four months before seeking the Chamber's guidance in relation to any disclosure requirements resulting from that material. In view of this delay, the Chamber reiterates its instruction that "as an on-going obligation during the trial proceedings, [the prosecution] shall disclose any Article 67(2) items or permit the defence to inspect any Rule 77 material in its possession or control, promptly upon their identification, throughout the presentation of evidence by the defence"; [REDACTED]; [REDACTED]; ICC-01/05-01/08-3255, para. 83: 'Therefore, where the Prosecution wishes to withhold disclosure on the basis of Rule 81(2), it must apply to the Chamber to receive authorisation to do so. While the Chamber notes the Prosecution's statement that it notified the Chamber of the existence of its Article 70 Investigation, the Prosecution did not apply to the Chamber for a ruling as to whether it must disclose relevant Rule 77 information or material or not. As such, the Chamber finds that insofar as the Prosecution was (i) in the possession of and (ii) did not disclose Rule 77 information on the grounds that it could prejudice further or ongoing investigations without applying to the Chamber for authorisation, it failed to satisfy the requirements of Rule 81(2).'

²² ICC-01/05-01/08-3257.

21. The Prosecution is taking an erroneously narrow view of its disclosure obligations. Concrete examples bear this out. On 30 June 2015, the Prosecution disclosed two records of interview to the Defence teams in the Article 70 Case. The first was an interview [REDACTED].²³ [REDACTED],²⁴ [REDACTED]. There can be no argument the fact that these materials should have been provided to the Defence in the Main Case. They have never been disclosed.

22. The Defence is not seeking the orders below simply because it is entitled under the Statute and Rules to have access to the material in question. There are concrete repercussions should the Prosecution continue to keep its contact with Main Case witnesses hidden from the Defence.

23. For example, the Prosecution has now filed its list of witnesses in the Article 70 Case, indicating that [REDACTED]. In addition to the right of the Defence to have access to material directly relevant to [REDACTED], it is also required to intervene in the Article 70 Case, if necessary, to protect Mr. Bemba's interests in the Main Case. This task is rendered impossible if proper and full disclosure does not occur. This is of particular importance given that the Main Case is at a more advanced stage than the Article 70 Case, and Mr. Bemba has been detained throughout the entirety of the present proceedings.

24. Moreover, if the Prosecution's interview records are indeed accurate, the Prosecution is using the same investigators on the Article 70 Case, as were used in the Main Case. On 26 June 2015, the Prosecution in the Article 70 Case disclosed a transcript of a phone conversation between Mr. Bemba and his former case manager, which had taken place prior to the start of the Defence case on 4 July 2012.²⁵ This conversation reveals the Defence strategy in relation a wealth of topics and evidence but, most relevantly for present purposes, it reveals the Defence

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ CAR-OTP-0077-1237.

strategy to the evidence of [REDACTED]. The Prosecution investigators who then [REDACTED] had access to these internal Defence discussions, which had taken place almost two years earlier. The Defence anticipates coming back before the Chamber in relation to this question. For the purposes of the present filing, however, this example serves to underscore the need to obtain full disclosure of all records of the Prosecution's contact with Main Case witnesses, in order to protect the rights of the accused, and seek the involvement of the Trial Chamber should it be necessary to safeguard the fairness of the present proceedings.

D. RELIEF REQUESTED

25. In light of the above, the Defence respectfully requests that the Trial Chamber:

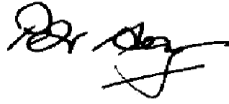
ORDER that the Prosecution disclose all material in its possession relevant to [REDACTED] in the Main Case;

ORDER the Prosecution to disclose immediately the interview records with [REDACTED];

ORDER the Prosecution to disclose immediately all documents falling within the terms of Decision 3070 including, but not limited to, items generated during [REDACTED]; and/or in the alternative;

ORDER the Prosecution, should it assert that no audio or video recordings of interviews [REDACTED] are in existence, to explain why [REDACTED]; and

REMAIN seized of the present issue in terms of further Defence requests for relief from prejudice arising out of the Prosecution's breach of its disclosure obligations.



Peter Haynes

Lead Counsel of Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

6 July 2015