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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**

Public

**Public Redacted Version of Defence Reply to the ‘Prosecution’s Response to
“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:

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A. INTRODUCTION

1. According to the Prosecution, these proceedings have now reached the ‘critical juncture of deliberations’.¹ It is in this context, that the Prosecution calls the Defence Request’² ‘spurious’, and admonishes the Defence for unnecessarily disturbing the Trial Chamber this late in the proceedings.³

2. At 16.00 on Friday, 31 July 2015, during the so-called ‘critical juncture’, the Prosecution disclosed 698 pages of documents in the Main Case.⁴ This material should have been disclosed to the Defence upon its creation, particularly in the absence of any authorization for delayed disclosure by the Trial Chamber.

3. The need for continued litigation over non-disclosure arises directly from the Prosecution’s chronic and systematic breaches of its obligations, the prejudice arising therefrom, and its failure to engage with the Defence’s *inter partes* efforts to resolve questions without resort to the Chamber. It is Mr. Bemba, incarcerated without provisional release, who bears the burden of any delays in the deliberations process. In the circumstances, however, he has no alternative but to bring the Prosecution’s violations to the attention of the Chamber in order to seek a remedy.

B. SUBMISSIONS

i. The Prosecution was obliged to disclose material generated during Prosecution contacts with Defence witnesses

4. A Prosecution investigator spoke with two Defence witnesses, D-02 and D-03, in April 2014.⁵ Prosecution contact with D-02 and D-03 should have been audio or video recorded under Rule 112(1) of the Rules.⁶ The Trial Chamber has ruled that ‘[i]tems generated during the course of contacts between prosecution and witnesses called by the defence may be material to the preparation of the defence.’⁷

¹ ICC-01/05-01/08-3275-Conf-Exp, para. 24.

² ICC-01/05-01/08-3264-Conf-Exp.

³ ICC-01/05-01/08-3275-Conf-Exp, para. 24.

⁴ ICC-01/05-01/08-3278-Conf-AnxA.

⁵ CAR-OTP-0080-0494 at 0498; CAR-OTP-0080-0165 at 0168.

⁶ ICC-01/05-01/08-3264-Conf-Exp, para. 18.

⁷ ICC-01/05-01/08-3070, para. 25.

5. Rather than complying with the terms of this order, the Prosecution has continued to pick and choose which contacts **it** thinks it is required to disclose. In relation to the April 2014 contact with D-02 and D-03, the Prosecution justified non-disclosure on the basis that '[n]ot every contact with a witness is material to Defence preparation and absent any disclosable content or properly articulated forensic purpose, is not disclosable.'⁸

6. The Prosecution cites no authority for this alleged legal standard. In fact, the 'forensic purpose' test was articulated at the ICTY, and relates to the standard which a party must meet when seeking to access confidential and *inter partes* material **from another case**.⁹ By its very existence, contact between a Prosecution investigator and a Defence witness in the instant case is disclosable. In perhaps the most obvious example, whether or not this April 2014 contact took place is relevant to assessing the credibility of the statement in which the witnesses claim that it did.

7. The Prosecution's justification for the non-disclosure of the April 2014 conversations with D-02 and D-03 is further undermined by its inconsistent averments as to their content. The Prosecution asserted in the Article 70 Case:¹⁰

[REDACTED]

Concerning the exact same conversations between its investigator and D-02 and D-03,¹¹ the Prosecution has now submitted in the Main Case:¹²

The purpose of those phone contacts **was simply to schedule meetings** between the Prosecution and the two witnesses.

⁸ ICC-01/05-01/08-3275-Conf-Exp, para. 15.

⁹ *Prosecutor v. Blaškić*, IT-05-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-public Post Appeal Pleadings and hearing Transcripts Filed in the Prosecutor v. Blaškić, 16 May 2002, para. 14; *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Decision on Motions for Access to Confidential Material, 16 November 2005, para. 11; *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Decision on Joint Defence Motion of Enver Hadžihasanović and Amir Kubura for Access to Further Confidential Materials in the Appeal Proceedings of the Blaškić case, 3 March 2004, p.4; *Prosecutor v. Delić*, IT-04-83-PT, Order on Defence Motions for Access to All Confidential Material in Prosecutor v. Blaškić and Prosecutor v. Kordić and Čerkez, 7 December 2006, p.6; *Prosecutor v. Popović et al*, IT-05-88-T, Decision on Pandurević Motion for Access to Confidential Material in Prosecutor v. Obrenović, 19 July 2007, p.5.

¹⁰ REDACTED.

¹¹ CAR-OTP-0080-0494 at 0498; CAR-OTP-0080-0165 at 0168.

¹² ICC-01/05-01/08-3275-Conf-Exp, para. 15.

In this context, where the Prosecution has advanced incompatible justifications in parallel proceedings, and where the Prosecution has never denied that the contact took place, its evasive submissions litigate in favour rather than against disclosure.

ii. The Prosecution was obliged to disclose the audio recordings

8. Again picking and choosing which disclosure obligations it feels bound to meet, the Prosecution claims that the audio recordings of its interviews with Defence witnesses are not disclosable in the absence of a dispute regarding, for example, the quality of the transcription, and asserts that the Defence is required to articulate a basis for their review.¹³ This is an absurd submission. Put simply, no argument could be advanced about the quality of the transcription in the absence of disclosure of the audio recordings. As a further and alternative submission, however, the multiple and manifest errors in the Prosecution's transcription and translation of telephone intercepts identified in the Article 70 Case¹⁴ would plainly qualify as a basis for the review of these transcripts

iii. The Prosecution's approach usurps the statutory functions of the Trial Chamber

9. The Trial Chamber has a 'duty to ensure that the prosecution fulfills its disclosure obligations'.¹⁵ The Chamber's adjudicative function and role as the ultimate arbiter of disclosure disputes is set out in Article 67(2) of the Statute. The Appeals Chamber has confirmed that the Prosecution must not take steps which would prevent the Trial Chamber from being the final arbiter of whether material should be disclosed to the Defence, or assessing the impact of non-disclosure on the fairness of the proceedings.¹⁶

10. The Prosecution's approach to the disclosure of [REDACTED] statements required the Trial Chamber to delegate its statutory duty to Trial Chamber VII. This is not a case of matters being 'central to the charges before another Chamber' being litigated in parallel.¹⁷ This concerns the disclosure of Prosecution contacts with Defence witnesses which falls squarely within the Trial Chamber's mandate in the Main Case. In cutting the Trial Chamber out of the process, the Prosecution has prevented the Chamber from being able to exercise

¹³ ICC-01/05-01/08-3275-Conf-Exp, para. 14.

¹⁴ ICC-01/05-01/08-3276-Conf-Exp-AnxA; ICC-01/05-01/08-3276-Conf-Exp-AnxB.

¹⁵ ICC-01/05-01/08-2292, para. 7.

¹⁶ ICC-01/04-01/06-1486, paras. 3, 4, 44-46.

¹⁷ ICC-01/05-01/08-3275-Conf-Exp, para. 8.

its statutory obligation to determine the impact of non-disclosure on the fairness of the Main Case.

11. [REDACTED].¹⁸ Most of this material was disclosable at the time of its creation, at a time when the defence may well have been able to act upon it. The disclosures of 31 July may obviate the need for specific orders in relation to that material, however, the Chamber still has to assess the impact of the prejudice arising out of the late disclosure on the overall fairness of the proceedings and tailor an appropriate remedy.

12. [REDACTED]. The Prosecution was therefore obliged to seek authorisation from the Trial Chamber to delay the disclosure of its interviews with him.

13. [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED].²¹ As such, the Prosecution advanced an argument which was directly contradicted by material it was withholding. [REDACTED].²²

14. The Defence would also have been in a position to make submissions as to further prejudice stemming from the non-disclosure of P-07's statement in October 2012, [REDACTED]. [REDACTED].²³ Had the Prosecution disclosed P-07's statement to the Defence as required in October 2012, thereby acting as an impartial minister of justice and informing the Defence that it may have been misled by [REDACTED], this could have involved a fundamental overhaul of Defence investigations and dramatically changed the face of the Defence case. [REDACTED] meant the Defence was unable to include these arguments to rebut the Prosecution's claims that the late disclosure of P-07's October 2012 statement caused no prejudice.²⁴

15. This further demonstrates why the Prosecution cannot simply ringfence these issues before a different Chamber, and then assert that the Trial Chamber in the Main Case has no need to be 'exceptionally engaged'.²⁵ The non-disclosure of statements of Defence witnesses gives rise to concrete and significant consequences in the Main Case. The disclosure of

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ ICC-01/05-01/08-3265-Conf, paras. 32-35.

²⁵ ICC-01/05-01/08-3275-Conf-Exp, para. 7.

statements of Defence witnesses falls squarely within the purview of the Trial Chamber in the Main Case. The prejudice to the Defence arises in the Main Case. The Prosecution was in error in trying to keep the Trial Chamber out of the process, and prevent it from exercising its statutory functions.

iv. Each Chamber must determine the relevant issues in the case it is trying.

16. This is not the first time in a case before the ICC that the same material has been disclosable in different trials. In relation to the parallel disclosure of the identity of an intermediary in the *Lubanga* and the *Katanga & Ngudjolo* case, Trial Chamber I held:²⁶

Although Trial Chamber I is clearly able to make a decision on the protective measures necessary for 143, and the need or otherwise to disclose his identity, in the context of the Lubanga trial (conducting the judgment required under Rule 81(2)), it is realistically unable to undertake the same exercise of judgment for Trial Chamber II. For instance, do the matters described by Trial Chamber II... result in the conclusion that the identity must be disclosed to the defence (under Rule 81(2)), or are there other, lesser measures which would secure fairness for the accused? **This requires a detailed understanding of the facts and issues in the Katanga trial, leading to a nuanced decision, which Trial Chamber I is ill-equipped to make.** And does a decision on disclosure need to be made at this stage, or can it be delayed to see how the evidence and issues evolve? **Only the judges of Trial Chamber II can sensibly answer these questions.**

17. By contrast, the Prosecution placed [REDACTED] exclusively before Trial Chamber VII, and then ridiculed the Defence suggestion that the present Trial Chamber decide the issue in the context of the Main Case, suggesting that such an approach was ‘dangerous’ and would result in ‘one Chamber of the Court undermining the authority of the other’.²⁷ In fact, only the present Trial Chamber possesses a detailed understanding of the facts and circumstances of the Main Case, and only the present Trial Chamber can determine whether delayed disclosure is or was warranted in these proceedings.

18. In this context, it is significant that the Prosecution sought delayed disclosure in the Article 70 Case by relying, *inter alia*, on [REDACTED].²⁸ The Trial Chamber in the Main Case was entitled to ‘sensibly answer’ questions as to whether delayed disclosure was

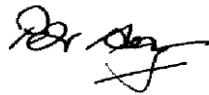
²⁶ ICC-01/04-01/06-2190-Red, para. 26.

²⁷ ICC-01/05-01/08-3275-Conf-Exp, para. 8.

²⁸ [REDACTED].

warranted in the Main Case, taking into account the facts and issues at play in the present proceedings, given that another Trial Chamber is ‘realistically unable’ to do so.²⁹

The whole respectfully submitted.



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10 August 2015

²⁹ ICC-01/04-01/06-2190-Red, para. 26.