Cour
Pénale
Internationale

International
Criminal
Court

Original: **English** No.: **ICC-01/05-01/13**
Date: **19 August 2015**

TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO

Confidential

Prosecution's Response to "Urgent Joint Request for Order Compelling the Prosecution to Disclose Materials from the Case of *Prosecutor v. Bemba*," ICC-01/05-01/13-1133-Conf-Corr

Source: **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, Prosecutor
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor

Counsel for Aime Kilolo Musamba
Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Jean-Jacques Kabongo
Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Fidele Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shelie Rodoma

Counsel for Narcisse Arido
Mr Charles Achaleke Taku
Mr Philippe Larochelle

Legal Representatives of Victims

The Office of Public Counsel for Victims

States Representatives

REGISTRY

Registrar
Mr Herman von Hebel

Victims and Witnesses Unit

Introduction

1. The Defence for Kilolo, Mangenda, Babala, and Arido ("the Defence"), are requesting this Chamber to order the Prosecution to disclose, pursuant to regulation 42(2), "all confidential *inter partes* material"[1] allegedly not yet disclosed from *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) (the "Main Case") ("Disclosure Request"). Simultaneously, the Defence have filed a request with Trial Chamber III seized of the Main Case, to access more or less the same materials that are the subject of their Disclosure Request.[2]

2. The categories of material requested for disclosure/sought to be accessed are:

(i) Testimony of Prosecution witnesses, tending to show that the falsehoods allegedly encouraged by the Accused were not, in fact, falsehoods;

(ii) Submissions and testimony (including of Prosecution witnesses) that assist in understanding the nature of the issues on which the Prosecution alleges the Accused have encouraged false testimony;

(iii) Decisions, communications and filings (whether of Trial Chamber III, Prosecution, Victims and Witnesses Unit ("VWU") or Defence) about the modalities by which the Defence and Prosecution were to – and did – contact, reimburse and "hand-over' witnesses to the Registry in the Main Case; and

(iv) Decisions, communications and filings concerning other relevant modalities of trial in the Main Case.[3]

3. The Defence initially claims the above information is disclosable by the Prosecution because it is "material to the Defence's preparation for trial in the Article

[1] ICC-01/05-01/13-1133-Conf, as corrected, 17 August 2015, ICC-01/05-01/13-1133-Conf-Corr.
[2] Disclosure Request, para. 16, referring to the filing "*Bemba et al.*, Urgent Joint Request for Access to Confidential Material, filed in ICC-01/05-01/08 on 10 August 2010," hereinafter "Access Request."
[3] Disclosure Request, para. 1.

70 Case pursuant to Rule 77 of the Rules,"[4] but subsequently also alleges the material is disclosable under article 67(2) of the Statute.[5]

4. The Disclosure Request is misconceived and should be dismissed.

5. *First*, the relevant materials corresponding to category (iii) have already been disclosed.

6. *Second*, regarding the remaining requested material (in categories (i), (ii) and (iv)), the Defence has not demonstrated that they fall within the Prosecution's disclosure obligations under article 67(2) or rule 77. The requested materials, particularly those in categories (ii) and (iv), are insufficiently identified, and the Defence fails to show either that they are exculpatory, or material to defence preparation. The materials reasonably identified in category (i) are patently irrelevant to the crimes with which the Accused are charged, and thus fall outside the scope of the Prosecution's disclosure obligations.

7. Even though the Prosecution has no duty to disclose the material sought by the Defence, the latter is at liberty to obtain those materials directly from Trial Chamber III (as they are neither in the Prosecution's possession or control), by seeking access from Trial Chamber III, as they have indeed done by way of their Access Request.[6]

8. Having filed an Access Request, the Defence's simultaneous submission of a Disclosure Request was unnecessary. Even if the Prosecution had a duty to disclose the requested material — which it does not —the Defence's simultaneous filing would still have been unwarranted. This is because, for the Prosecution to accomplish the disclosure, it would itself, as a matter of prudence, first have to obtain authorisation from Trial Chamber III, regardless of whether a variation of

[4] Disclosure Request, para. 1.
[5] Disclosure Request, paras. 3-4, and submission's heading, III(i).
[6] As shown below, however, in a separate filing before Trial Chamber III, the Prosecution will partly oppose the Access Request.

protective measures was sought.[7] In this sense, it must be stressed that the Prosecution is not the custodian of court records, nor is the record of a case, at least in principle, "evidence in the Prosecution's possession or control", within the terms of article 67 (2), or material in possession or control of the Prosecution, within the terms of rule 77. Nor has the Prosecution authority to vary protective orders issued by a Chamber of the Court seized with a case. Accordingly, requests to obtain testimony or exhibits from a case should ordinarily be treated as requests for access to the record of that case, and filed before the competent Chamber, and not as matters of disclosure.

9. Finally, the Prosecution advises the Chamber that it is opposing the Access Request pending before Trial Chamber III to the extent that it seeks access to the same material sought in the Disclosure Request.[8] Overall, the Access Request fails as insufficiently specific and because the materials in category (iii) have already been disclosed, and those reasonably identified in category (i) are irrelevant to the charges. However, regarding materials in categories (ii) and (iv), given the relatively nominal showing of materiality generally required for access requests, the Prosecution will not oppose such access as Trial Chamber III may deem appropriate in its discretion, subject to the views of the Legal Representative of Victims and the VWU on any consequential security implications.

Confidentiality

10. The Prosecution files this confidentially, pursuant to regulation 23*bis*(2) of the Regulations of the Court, as it responds to the Defence Disclosure Request filed with the same classification.

Submissions

(a) Material under category (iii) has already been disclosed

[7] ICC-01/05-01/08-3074, e.g., paras. 19-21.
[8] The Prosecution's response to the Access Request will be filed before Trial Chamber III in due course.

11. The Defence's request for "decisions, communications and filings (whether of Trial Chamber III, Prosecution, VWU or Defence) about the modalities by which the Defence and Prosecution were to – and did – contact, reimburse and "hand over" witnesses to the Registry," should be dismissed because the relevant materials have already been disclosed.[9]

(b) The Defence fails to sufficiently identify the items sought regarding categories (i), (ii) and (iv), or to demonstrate that they may be exculpatory or material to the preparation of the defence

(i) The materials sought do not fall within article 67(2)

12. Potentially exculpatory material under article 67(2) "[i]ncludes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of prosecution evidence."[10]

13. The potentially exculpatory evidence must have a real, and not merely, minimal impact on the trial in favour of the accused.[11]

14. To show that the Prosecution is in breach of its article 67(2) obligations, the Defence must not only prove that the material requested is in the custody or under the control of the Prosecution, but must also (i) specifically identify the material and (ii) make a *prima facie* showing of the sought material's probable exculpatory nature.[12] To discharge this burden, the Defence must present a *prima facie* showing of the probable exculpatory nature of the material.[13] To establish a *prima facie* case, the Defence need not show that the material directly contradicts the Prosecution's

[9] ICC-01/05-01/08-1081; ICC-01/05-01/08-972; ICC-01/05-01/08-1016; ICC-01/05-01/08-2293-Conf.
[10] ICC-01/04-01/06-1401, para. 59.
[11] ICC-01/04-01/06-2152, para. 94.
[12] For the Tribunal for the former Yugoslavia ("ICTY"), see e.g. *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179; for the Tribunal for Rwanda ("ICTR"), see e.g., *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 ("*Kalimanzira* Appeal Judgement"), para. 18; *Mugenzi et al v. The Prosecutor*, Case No, ICTR-99-50-A, Decision on Prosper Mugiraneza's Motions for Relief for Rule 68 Violations, 24 September 2012, para. 8.
[13] For the ICTR, see e.g. *Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 17.

evidence,[14] or that it is in fact exculpatory.[15] But, it must be shown, in light of the submissions of the parties, that the evidence is potentially exculpatory, or could be relevant to the defence of the accused.[16]

15. Here, the Defence fail to make the necessary demonstration.

16. *First*, the materials sought are not in the possession or custody of the Prosecution, but of Trial Chamber III. As noted earlier, since the Prosecution is not the custodian of court records, the record of the Main Case, at least in principle, is not "evidence in the Prosecution's possession or control," within the terms of article 67(2). That is why, even assuming the Prosecution had a duty of disclosure in relation to any material – and it does not have in relation to any of the material in the Disclosure Request - it would itself have to seek Trial Chamber III's authorisation to execute any disclosure. Accordingly, if the Defence wanted the testimony or exhibits from the Main Case, it should have submitted a request for access to the record of that case, and filed before the competent Chamber, other than submitting the Disclosure Request before this Chamber.

17. *Second*, concerning materiality, the Defence's submissions are sweeping and generalised assertions, with an unsubstantiated summation that there is "a good chance" that the information will be material to the preparation of the Defence." [17] The so-called "good chance" test cannot meet the required threshold of demonstration to secure disclosure under either article 67(2) or rule 77. Indeed, at the *ad hoc* Tribunals, the "good chance" threshold, which is a low level of demonstration, may only suffice to access materials from any source, including from other cases before the Tribunals, but is insufficient to secure disclosure. When adjudicating an access request, the ICTY's *Mladic* decision has thus stated,

[14] ICTR's *Kalimanzira Appeal* Judgement, para. 19.
[15] ICTR's *Kalimanzira* Appeal Judgement, para. 19.
[16] *Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence, 23 March 2011, para. 13; *Kalimanzira* Appeal Judgement, paras. 18-20.
[17] Disclosure Request, para. 14.

> [w]ith regards to *inter partes* confidential material, the applicant party must demonstrate that such material is "likely to assist the [party's] case materially, or at least there is a good chance that it would. The "good chance" standard may be met by the establishment of a legitimate forensic purpose, demonstrated by the existence of a "geographical, temporal or otherwise material overlap between the applicant's case and the case from which the material is sought. The "good chance" standard, however, does not require that the applicant party "establish a specific reason that each individual item is likely to be useful.[18]

18. The Defence's Disclosure Request's reliance on a low-level "good chance" standard is insufficient to support a disclosure request. Indeed, their submissions are premised, *inter alia*, on the Prosecution's own submissions on the nexus between the Article 70 Case and Main Case.[19] But, this premise is misconceived. The mere fact—as the Prosecution has previously submitted when seeking authorisation from Trial Chamber III to disclose some material—that the Article 70 Case has a direct nexus to the Main Case, does not mean that any and all material in the Main Case is necessarily "relevant" to the Article 70 Case.[20] Indeed, the Prosecution's own submissions specifically identified the evidence that could fall within the purview of its disclosure obligations. These, included, for instance, the testimony of the 14 named *Bemba* Defence witnesses, one Court witness, and specifically identified filings.[21] The Prosecution also set out the relevance of this sought material to the charges preferred against the Accused.[22]

19. *Third*, the Disclosure Request, particularly in relation to items (ii) and (iv), is not sufficiently specific, and thus incapable of substantiating that the material are exculpatory or material to defence preparation. In relation to the "sufficiently-specific" threshold, the *ad hoc* Tribunal case-law construing rule 68/rule 66(B) (which are materially similar to the ICC's article 67(2) and rule 77) is noteworthy:

---

[18] *Prosecutor v. Mladic*, Case No. IT-09-92-PT, Decision on Defence Request for Access to Confidential Materials From Krstic Case, 21 March 2012, para. 5, also citing, inter alia, *Prosecutor v. Jokic*, Case No. IT-02-60-A, Decision on Motion by Radivoje Miletic for Access to Confidential Information, 9 September 2005, p. 4.
[19] Disclosure Request, para. 11; *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73.13, Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008, para. 12.
[20] *Contra* Disclosure Request, para. 11.
[21] ICC-01/05-01/13-355-AnxA-Red, 27 February 2015, paras. 2, 6, 13, 24.
[22] ICC-01/05-01/13-355-AnxA-Red, 27 February 2015, paras. 13-17.

> Rule 66(B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination. The Defence may not rely on a mere general description of the requested information but is required to define the parameters of its inspection with sufficient detail. Suitable parameters for such specification may be an indication of a specific event or group of witnesses which the request focuses on, a time period and/or geographical location which the material refers to, or any other features defining the requested items with sufficient precision. A request may also refer to a category of documents defined by criteria which apply to a distinct group of individuals. The scope of what constitutes a 'discrete group of individuals' for the purpose of an inspection request, as well as the determination whether the required level of specificity has been met, is considered in light of the specific framework of the case. The Appeals Chamber has previously found the specificity requirement to be satisfied inter alia in cases where the defence has sought access to a precise category of documents, such as immigration-related material of certain Defence witnesses, or witness statements of a specific witness.[23]

20. In relation to the Disclosure Request's category (ii) materials, the Defence seeks disclosure of any material that may assist them in "understanding the nature of the issues on which the accused are alleged by the Prosecution in the Article 70 Case to have encouraged false testimony." This is too open-ended, as the "understanding" they are seeking, and the specific "issues" engaged, are not identified. This vagueness is not ameliorated by the generalised reference to the category of documents that is sought in the form of "submissions" and "testimony." The same is true for category (iv)'s "other relevant modalities of trial in the Main Case."

21. *Fourth*, in relation to the Disclosure Request's category (i) materials, these are not material to the defence of the Accused. The alleged Prosecution witness testimony sought "tending to show that the falsehoods allegedly encouraged by the defendants in Article 70 Case, were not, in fact falsehoods,"[24] misunderstands the nature of the charges. It is the corrupt influence of a witness' testimony that violates article 70(1)(c) – false or not. Further, a witness' deliberate withholding of the fact of such influence, or intentional misrepresentation of facts going to the truthfulness of their testimony (such as, the true basis of knowledge for their evidence, or the

[23] *Karemera v. The Prosecutor*, Case ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision of Alleged Rule 68 Violation, 17 May 2010, para. 32.
[24] Disclosure Request, para. 1; see also paras. 8-10.

Accused's illicit preparation or coaching of the same) renders their testimony *false* in violation of article 70(1)(a). The same notion of "falseness" applies to article 70(1)(b) offences.

22. Finally, the Prosecution notes that it is not obliged to disclose the material that allegedly remains outstanding. Under article 67(2), like rule 77, the Prosecution has an obligation to disclose independently of any specific request from the Defence, even if the material is publicly available.[25] The fact that the material is not in its possession, and that the Defence may readily access it from the Trial Chamber, are, however, relevant considerations.[26]

23. Here, the alleged outstanding material is not in the Prosecution's possession or control, but that of Trial Chamber III, and accessible to the Defence upon proper justification — a fact known to the Defence in this case for well over a year.[27] Therefore, even if the Prosecution may have restrictively construed materiality under article 67(2), the Defence cannot demonstrate any prejudice.

(ii) The material sought does not fall within rule 77

24. The material sought is not in the Prosecution's possession or control, and the Defence similarly fail to sufficiently identify the items sought with any particularity or demonstrate its materiality to the preparation of their defence under rule 77.

25. Like article 67(2), the Defence bears the onus of demonstrating any alleged breach of the Prosecution's rule 77 disclosure obligation. To succeed, the Defence not only has to (i) show that the material is in the possession or control of the Prosecution[28] (which, it is not in this case), but also (ii) show the material's *prima facie* materiality to the preparation of the defence case[29] and (iii) sufficiently identify the

[25] ICC-02/05-03/09-501 OA4, 28 August 2013, para. 34.
[26] For the ICTR, see e.g., *Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence, 23 March 2011, para. 15.
[27] See also ICC-01/05-01/08-2972 (Trial Chamber III dismissing Counsel for Bemba's request to access the "entirety" of the Main Case for lack of sufficient specificity). No further efforts to access the material, either by this Counsel, or other Defence teams, can be shown.
[28] ICC-02/05-03/09-501 OA4, 28 August 2013, para. 34.
[29] ICC-02/05-03/09-501 OA4, 28 August 2013, paras. 2, 42.

requested material.[30] The Prosecution is not under any obligation "[t]o offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection; it is instead to provide all items that are material to the preparation of the defence […]."[31] Indeed, the Prosecutor "[d]oes not have an obligation of "handing the defence the keys to the warehouse […]."[32]

26. For the same reasons as argued above in respect of article 67(2), the Defence's request for disclosure based on rule 77 fails.

27. *First*, the materials sought are in not in the possession or custody of the Prosecution, but of Trial Chamber III. Since the Prosecution is not the custodian of court records, the record of the Main Case, at least in principle, is not "material in possession or control of the Prosecution," within the terms of rule 77.

28. *Second*, the Disclosure Request does not sufficiently identify the material so as to show that it falls within the Prosecution's obligations under rule 77. As noted above, materials in categories (ii) and (iv) are too open-ended. The "understanding" sought, the "issues" engaged, and so-called "modalities of trial" in the Main Case, are overly vague. The case-law of the *ad hoc* Tribunals cited above in relation to the "sufficiently specific" prong of article 67(2) is instructive. The ICC's case-law thus far on rule 77 is also noteworthy. In the *Ruto* Case, for instance, Trial Chamber V(A) found the following Defence rule 77 request sufficiently specific: "[a]ny and all information in its possession demonstrating Mungiki support for the Orange Democratic Movement ([the] "ODM") and/or Raila Odinga in the 2007 elections, including any transcripts and/or statements of Prosecution interviews with Mungiki members […]."[33]

[30] ICC-01/09-01/11-1465, para. 15.
[31] ICC-01/05-01/08-632, para. 20.
[32] ICC-01/05-01/08-632, para. 26.
[33] ICC-01/09-01/11-1465, paras. 1, 15.

29. In the view of Trial Chamber V(A), the above met the "sufficiently specific" requirement because "[t]he Defence do not request evidence of any Kikuyu support for the ODM in the 2007 elections, but only for the support of the Mungiki."[34]

30. The Disclosure Request's categories (ii) and (iv) lack the requisite "delineations" as those in the *Ruto* Case. The scope of the "understanding" sought, the so-called "issues" in the case, and "modalities" of the trial in the Main Case, are too vague and undefined.

31. *Third*, the Defence also fails to demonstrate the *prima facie* materiality of what is sought under categories (ii) and (iv). Material falling within rule 77 need not directly be linked to exonerating or incriminating evidence; rather it refers to all objects or documents that may be relevant for the preparation of the defence.[35] But the materiality prong, and the right to disclosure, are not unlimited:

> [T]he right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case. The Chamber may need to be provided with further information by the Prosecutor about the documents being sought, either in the form of lists of documents or the documents themselves, as well as an accompanying explanation, in order to be placed in the best position to take an informed decision with regard to whether the documents in respect of which disclosure was requested are material to the preparation of the defence.[36]

32. For the same reasons set out above in relation to article 67(2), the material identified in category (i) is irrelevant to the charges against the Accused. Accordingly, it cannot be considered material to "defence preparation", however broadly that term may be construed. Regarding material sought under categories (ii) and (iv), the material is insufficiently identified, and the Defence's claims of how it is material to their defence preparations are not adequately substantiated. As argued above, the Defence's Disclosure Request is based on sweeping and generalised assertions, with an unsubstantiated summation that there is "a good chance" that the

[34] ICC-01/09-01/11-1465, para. 15.
[35] ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 77.
[36] ICC-02/05-03/09-501 OA4, 28 August 2013, para. 39.

information will be material to the preparation of the Defence.[37] To reiterate, the so-called "good chance" test is a low-level standard which cannot meet the requisite higher threshold of demonstration required to secure disclosure under article 67(2) or rule 77.

33. Finally, as argued earlier, the Prosecution was under no obligation to disclose the material that allegedly remains outstanding. The fact that the material is not in its possession, and that the Defence could readily access such material from the Main Case, are relevant considerations. Under rule 77, the Prosecution has an obligation to disclose independently of any specific request from the Defence, even if the material is publicly available.[38] But, like its rule 67(2) obligation, the fact that the existence of the relevant material is known by and accessible to the Defence, is a relevant consideration. This factor is critical to assessing any prospective claim of prejudice by the Defence based on any alleged Prosecution disclosure violation.[39]

34. Here, the alleged outstanding material is not in the Prosecution's possession or control, but that of Trial Chamber III. It is as available to the Defence now, as it has been throughout the nearly two-year pendency of this case, upon an appropriate showing before that Chamber. Therefore, the Defence cannot demonstrate any prejudice, even *arguendo*, that the Prosecution may have restrictively construed materiality.

(c) The Prosecution's position on the Access Request in the Main Case

35. The Prosecutor advises the Chamber that it will partly oppose the Defence's Access Request in a separate filing before Trial Chamber III to the extent it seeks access to the same material sought in the Disclosure Request. The Defence's Access Request suffers some deficiencies. Overall, it is not sufficiently specific, and to the extent that the materials in category (iii) have already been disclosed, and those

---

[37] Disclosure Request, para. 14.
[38] ICC-02/05-03/09-501 OA4, 28 August 2013, para. 34.
[39] *Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Decision on Ephrem Setako's Motion to Amend His Notice of Appeal and Motion to Admit Evidence, 23 March 2011, para. 15.

reasonably identified in category (i) are irrelevant to the charges, the Access Request should be denied.

36. This Court has rejected overly generalised access requests that do not sufficiently identify what is sought, and its materiality. For example, Trial Chamber III previously denied Counsel for Bemba's request to access "the entirety" of the Main Case's confidential case record,[40] "absent any specific indication as to the nature and content of the documents at issue and without any justification as to why they are necessary to ensure the effective representation of the accused [...]."[41]

37. But, given the lower level demonstration associated with access requests, the Prosecution will not oppose or will defer to Trial Chamber III's discretion with respect to materials in categories (ii) and (iv). The *ad hoc* Tribunals have allowed a somewhat lower level of demonstration of materiality and specificity for "access requests" compared with "disclosure requests" under provisions substantially similar to the Court's article 67(2) and rule 77. As underscored by the ICTY's *Mladic* decision,

> A party is always entitled to seek material from any source, including from another case before the International Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown. The Tribunal's jurisprudence concerning the identification requirement is not particularly onerous, and applicant requests for "all confidential material" are generally considered sufficiently specific to meet this standard. With regards to *inter partes* confidential material, the applicant party must demonstrate that such material is "likely to assist the [party's] case materially, or at least there is a good chance that it would. The "good chance" standard may be met by the establishment of a legitimate forensic purpose, demonstrated by the existence of a "geographical, temporal or otherwise material overlap between the applicant's case and the case from which the material is sought. The "good chance" standard, however, does not require that the applicant party "establish a specific reason that each individual item is likely to be useful.[42]

[40] ICC-01/05-01/08-2972, para. 10.
[41] ICC-01/05-01/08-2972, para. 10.
[42] *Prosecutor v. Mladic*, Case No. IT-09-92-PT, Decision on Defence Request for Access to Confidential Materials From Krstic Case, 21 March 2012, para. 5, also citing, inter alia, *Prosecutor v. Jokic*, Case No. IT-02-60-A, Decision on Motion by Radivoje Miletic for Access to Confidential Information, 9 September 2005, p. 4.

38. Therefore, the Prosecution informs the Chamber that in relation to the materials sought by the Defence in their Access Request's categories (ii) and (iv), given the somewhat low-level threshold of demonstration respecting identification and materiality, the Prosecution will either not oppose access or defer to the discretion of Trial Chamber III, subject to the views of the VWU and LRV on security implications if any access is granted.

Relief

39. For the reasons above, the Defence's Disclosure Request should be dismissed. Save for materials in the Access Request category (iii) which have already been disclosed, and those in category (i), which are irrelevant to the charges, the Prosecution has not opposed or left the Defence's Access Request regarding materials in categories (ii) and (iv) to Trial Chamber III's discretion. And, this is only subject to the views of the VWU and LRV on the security implications if any access is granted.

Fatou Bensouda, Prosecutor

Dated this 19th August 2015
At The Hague, The Netherlands.