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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**

**Confidential, *EX PARTE*, only available to the Prosecution and the Defence
in ICC-01/05-01/08 and ICC-01/05-01/13**

with

**Confidential, *EX PARTE*, only available to the Prosecution and the Defence
in ICC-01/05-01/08 and ICC-01/05-01/13 Annex A**

Prosecution's Response to "Urgent Joint Request for Access to Confidential Material"

Source: The Office of the Prosecutor

**Document to be notified in accordance with Regulation 31 of the Regulations of the
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Trial Chamber VII

Judge Bertram Schmitt, Single Judge

I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the overly broad joint request by four Defence teams in the ICC-01/05-01/13 Case (also, "Article 70 Case") for "access to, and disclosure of, all confidential *inter partes*, and *ex parte* Defence, material in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) ("Main Case")."¹ The Defence simultaneously filed a similar but more limited request in the Article 70 Case for disclosure and access to confidential Main Case material ("Simultaneous Disclosure and Access Request").²

2. The Access Request filed in the Main Case relates to five categories of material:

- (i) All confidential transcripts in the Main Case, including all Prosecution and Chamber witnesses ("**All Transcripts**");
- (ii) All confidential exhibits in the Main Case ("**All Exhibits**");
- (iii) All confidential *inter partes* or *ex parte* filings by the Chamber, the Prosecution, Defence, or any organ of the Registry or from any other source whatsoever ("**All Filings**");
- (iv) All confidential *inter partes* communications by the Trial Chamber, Prosecution, Defence, or any organ of the Registry, to any party ("**All Communications**"); and
- (v) All confidential disclosure provided by the Prosecution to the Defence in the Main Case ("**All Disclosures**").³

¹ ICC-01/05-01/08-3282-Conf-Exp-AnxA, Urgent Joint Request for Access to Confidential Material, 10 August 2015 ("Access Request").

² ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 1.

³ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 22.

3. Overall, the Access Request lacks sufficient specificity. Its request for all access to confidential Main Case material is excessive, considering that the Article 70 Case and the Main Case differ in scope and only some of the issues are cross-cutting. To the extent that this broad Access Request includes confidential material that is relevant to the Article 70 proceedings, the Prosecution has disclosed those materials within its possession or control in accordance with its disclosure obligations. The Trial Chamber III (“Chamber”) should dismiss the Access Request in its entirety as undefined, unlimited, and insufficiently justified.

II. Request for Confidentiality

4. Pursuant to regulation 23(2)*bis* of the Regulations of the Court, the Prosecution requests that this document and its Annex A be received as “Confidential, *EX PARTE*, only available to the Prosecution and the Defence in ICC-01/05-01/08 and ICC-01/05-01/13” as they respond to the Access Request, which bears the same classification.⁴

III. Submissions

The Simultaneous Disclosure and Access Request in the Article 70 Case:

5. At the beginning of this Access Request, the Defence attempts to limit the materials sought into four definitive categories to mirror its Simultaneous Disclosure and Access Request in the Article 70 Case.⁵ Those categories are:

⁴ However, the Prosecution does not object to reclassification of this document to allow the Legal Representatives of Victims to submit their observations as access to confidential material in this case concerns them, or reclassification as Public.

⁵ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para. 1.

- (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.⁶

6. In relation to these four categories, the Prosecution adopts its submissions opposing the same in the Article 70 Case and stating that an access request from the Trial Chamber III is the appropriate recourse.⁷ The Prosecution summarised that, “[o]verall, 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

⁶ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para.1.

⁷ ICC-01/05-01/13-1162, 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, 27 August 2015, paras.7-8: “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 protective measures was sought.” The Prosecution made reference to ICC-01/05-01/08-3074, e.g., paras.19-21.

appropriate in its discretion, subject to the views of the Legal Representative of Victims (“LRV”) and the VWU on any consequential security implications.”⁸

7. In its decision on the Simultaneous Disclosure and Access Request, the Trial Chamber VII’s Single Judge recalled that “the Chamber has already cautioned the parties that the purpose of these proceedings is not to re-litigate the Main Case.” Submissions which attempt to do so, or evidence presented solely for this purpose, will not be entertained.”⁹ Furthermore, the Single Judge rejected the Defence request and ruled that the “Trial Chamber III, not this Chamber, has primary authority to decide whether to provide access to material in the Main Case record. Further, those portions of the Requests alleging - and requesting remedies for - disclosure violations are directly related to access to material (speculated to be) in the Main Case record and are therefore premature.”¹⁰

The Access Request filed in this Case:

8. The Access Request lacks sufficient specificity and justification to enable an assessment of whether access is warranted. The Prosecution notes that the Access Request filed in this case relates to all confidential Main Case material and thus goes beyond the four categories sought in the Simultaneous Disclosure and Access Request in the Article 70 Case.¹¹

⁸ ICC-01/05-01/13-1162, 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, 27 August 2015, paras.9 and 20-21.

⁹ ICC-01/05-01/13-1188, Decision on Defence Requests for Disclosure of Materials from the Record of the Case of The Prosecutor v. Jean-Pierre Bemba Gombo and Related Matters, 27 August 2015, para.12.

¹⁰ ICC-01/05-01/13-1188, para.13. [footnotes omitted].

¹¹ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para.1: “[t]he material of relevance in the Main Case include [...] This and other *inter partes* confidential information ...” [Emphasis added].

9. The Access Request fails to identify specific categories of information or relevant issues to enable the Chamber to assess the materiality of the requested access. In the *Banda and Jerbo* case, the Defence requested the disclosure of all confidential material supporting the application for a warrant of arrest against Mr Omar Hassan Ahmad Al Bashir (except for statements of victims and identifying information of insider witnesses), which related to a different case.¹² The Appeals Chamber decided that the Trial Chamber must first determine whether the category of information requested by the Defence was relevant to the preparation of the Defence.¹³

10. To the extent that the Access Request also includes material that is relevant to the Article 70 proceedings, which fall within the possession or control of the Prosecution, the Chamber should dismiss these arguments since those items have been disclosed to all the Article 70 Case Defence teams. The Prosecution's obligation to disclose potentially exculpatory evidence and material for Defence preparation relates to all material in its possession or control. This includes any relevant confidential communications and information disclosed between the parties in another case, and relevant information regarding the credibility of Defence witnesses. The Access Request fails to identify any such relevant material that remains undisclosed, and sufficiently justify its materiality.

¹² ICC-02/05-03/09-501, 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, OA 4, 28 August 2013, para.5.

¹³ ICC-02/05-03/09-501, paras.41 and 47-48.

11. With regard to the threshold requirement for access, the *ad hoc* Tribunals have allowed a somewhat lower demonstration of materiality and specificity for “access requests” compared with “disclosure requests” under provisions substantially similar to the Court’s article 67(2) of the Rome Statute and rule 77 of Rules of Procedure and Evidence. 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.’”¹⁴

¹⁴ *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.

12. Here, the Access Request for All Transcripts, All Exhibits, All Filings, All Communications, and All Disclosures fails to meet that requisite threshold. Such requests should, at the very least, identify specific categories of information or relevant issues that are material to the Defence preparation, and also sufficiently demonstrate the legitimate forensic purpose. The Prosecution notes that understanding the nature of cases at the *ad hoc* Tribunals is important to contextualise the lower threshold required for access in cases such as *Mladic*, which invariably relate to a geographical or other material overlap in another case with similar charges of core international crimes for the same or related incidents. The Access Request, in contrast, seeks confidential information from the Main Case where the scope of the charges and relevant issues are quite distinct.¹⁵ Therefore, even access to “all confidential material”, which the Access Request seeks, cannot be so general as to encompass the entire record of a case or an entire category of information without sufficient justification.¹⁶

13. This Chamber has previously rejected generalised all access requests for all confidential material. For example, it denied the request for access to “the entirety” of the Main Case’s confidential case record by the Accused’s Counsel in the Article 70 Case, “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 [...]”.¹⁷ The Access Request similarly seeks all confidential material in the entire case record. Thus, without sufficient identification and

¹⁵ See, for example, ICC-01/05-01/08-3100, para. 41: “while the allegations in case ICC-01/05-01/13 arise out of alleged offences against the administration of justice in the Bemba case, the issues central to the charges and the relevant materials are quite distinct. That the information may be material to the preparation of the defence in case ICC-01/05-01/13 does not automatically make such information subject to disclosure in the Bemba case. Any such assessment should be done on a case-by-case basis.” Also, see, paragraph 7 above.

¹⁶ ICC-01/05-01/13-1162, para. 18: 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. [footnote omitted]

¹⁷ ICC-01/05-01/08-2972, para.10.

justification, the Chamber is unable to assess whether the information sought serves a legitimate forensic purpose for the Defence in the Article 70 proceedings.

14. Furthermore, the Access Request erroneously asserts that this Chamber “ordered full disclosure of the testimony of all Defence witnesses in the Main Case to the parties in the Article 70 Case on the basis of Prosecution arguments that ‘the items comprise evidence that are material’ to the Article 70 Case.”¹⁸ To the contrary, the Chamber had deferred its decision on the Prosecution’s originally formulated request for all confidential transcripts of all Defence witnesses called in the Main Case for use in the Article 70 proceedings.¹⁹ In fact, the Chamber authorised limited disclosure in relation to the 15 witnesses concerned, their 49 transcripts, and five court documents after the Prosecution submitted a reformulated tailored request.²⁰

15. In relation to a variation of protective measures, which the Access Request argues in the alternative, this Chamber ruled that it must determine whether the variation sought is appropriate and necessary.²¹ The Chamber determined that it is required to assess whether disclosure of the unredacted testimonies of all protected witnesses called by the Defence in the *Bemba* case, including their identities, to the Defence in case ICC-01/05-01/13 would entail any risk to these witnesses.²² In that regard, the Prosecution

¹⁸ ICC-01/05-01/08-3282-Conf-Exp-AnxA, para.6. [Emphasis added].

¹⁹ ICC-01/05-01/08-3014, Decision on “Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding”, 12 March 2014, paras.19-20: the Chamber only authorised disclosure of propose public redacted versions of the transcript of testimonies of Defence witnesses in the Article 70 Case.

²⁰ ICC-01/05-01/08-3074, Decision on “Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding”, 12 March 2014, paras.19-21.

²¹ ICC-01/05-01/08-3014, paras.16-18. For instance, the Chamber ruled that, at a minimum, it would try to seek the consent of all victims as required under regulation 42(4) of the Regulations of the Court. See, also, ICC-01/05-01/08-3074, 7 July 2014, paras.19-21.

²² ICC-01/05-01/08-3014, para.18.

submits that the views of the LRV and the VWU should be sought prior to granting access to confidential information.²³

16. Moreover, the Access Request for all *ex parte* filings should be rejected. This Chamber previously stated explicitly that its authorisation for the Prosecution to disclose five specific filings to the Defence in the Article 70 Case related to “[o]nly confidential versions available to the prosecution (no *ex parte* filings)”.²⁴ The Access Request fails to provide substantive justification for *ex parte* filings beyond merely arguing that all Defence Counsel are obligated to adhere to confidentiality obligations, and speculatively asserting that unequal access as a result of prior involvement in the Main Case would disadvantage other Defence teams.²⁵ Yet, for example, not all Defence teams in this Court have access to confidential material in all other cases simply because they are bound by undertakings of confidentiality. It would have to demonstrate, for example, why any *ex parte* filings that may or may not even be available to the Prosecution or Defence in the Main Case should be provided to all the Defence teams in the Article 70 Case.

17. To enable the Chamber to determine if access is warranted, the Defence must specify and sufficiently justify the materiality of the information sought. Even if the threshold for access is deemed lower than that required for disclosure, the Defence should at least attempt to identify specific categories of material or the relevant issues and sufficiently demonstrate their legitimate forensic purpose for the Article 70 proceedings. The Access Request fails to do so.

²³ ICC-01/05-01/08-3282-Conf-Exp-AnxA, paras.14 and 16: the Access Request seeks additional material on the modalities and reasons for contacting witness related to a filing from the VWU, and additional information about the content, modalities of access, and level of confidentiality regarding the LRVs questions.

²⁴ ICC-01/05-01/08-3014, fn.53.

²⁵ ICC-01/05-01/08-3282-Conf-Exp-AnxA, paras.18-20.

IV. Relief Sought

18. For the reasons above, the Prosecution requests that the Chamber dismiss the Access Request in its entirety.



Fatou Bensouda, Prosecutor

Dated this 2nd Day of September 2015
At The Hague, The Netherlands