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No.: ICC-01/05-01/13

Date: 03/09/2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt (Presiding Judge)
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

*v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Public Redacted with Confidential Annex A

**Public Redacted Version of “Response to the “Leave to Appeal Decision on
Defence Requests for Disclosure (ICC-01/05-01/13-1188)””**

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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**Other
Trial Chamber III**

Introduction

1. The Defence for Mr. Jean-Pierre Bemba (the Defence) respectfully files its response to the 'Leave to Appeal Decision on Defence Requests for Disclosure (ICC-01/05-01/13-1188)', (the Request).¹
2. The Defence supports the Request, and agrees that the issue of the Prosecution's disclosure obligations vis-à-vis the materials in the Main Case meets the criteria for interlocutory appeal.
3. The present filing has been filed on a confidential basis due to the fact that it cites to extracts from a confidential filing from the Main Case. The Defence will file a public redacted version forthwith (and has no objection to the filing in its entirety been reclassified as public).

Submissions

4. The Defence concurs that the issue, as to whether the Trial Chamber erred by finding that "Trial Chamber III, not this Chamber, has primary authority to decide whether to provide access to material in the Main Case record" arises from the Decision.²
5. Trial Chamber III's mandate and role in reviewing requests for access to materials in the Main Case revolves around the question of confidentiality and protective measures (as set out in Regulation 42(3)). Trial Chamber III is not, however, in charge of ensuring the rights of the Defence, and the fairness of the proceedings in Case No. ICC-01/05-01/13.

¹ ICC-01/05-01/13-1204.

² Impugned Decision para. 13.

6. Although Trial Chamber III *can* grant the Defence direct access, Trial Chamber III cannot act as the gatekeeper for disclosure as concerns Article 67(2) or Rule 77 materials because it is not in a position to assess what might fall within the scope of Article 67(2) or Rule 77 in the Article 70 case.

7. The primary responsibility for effecting disclosure must therefore rest with the Prosecution, and remain under the active supervision of the Article 70 Trial Chamber.

8. The Defence further agrees that the issue affects significantly the fairness and expeditiousness of the proceedings.

9. The issue has significant ramification as concerns the timing of access to relevant materials from the Main Case, the efficiency of the proceedings for obtaining access, and the existence of effective remedies in case the Defence is not granted access, or is granted access at a late stage.

10. Trial Chamber III is not in a position to police the Prosecution's conduct in the Article 70 case and cannot verify any claims on the part of the Prosecution that access is not necessary either because the information is irrelevant or because it has already disclosed 'relevant materials' in the Article 70 case.

11. This is an issue of significant concern given the indications that the Prosecution has not disclosed information from the Main Case, which is clearly relevant to the Defence teams in the Article 70 case.³

³ The Defence for Mr. Bemba identified several items from the Main case which appears to be relevant to the preparation of the Defence concerning information transmitted by the Independent Counsel (see ICC-01/05-01/13-994-Conf-Exp, paras. 5-12). When the Defence inquired with the Prosecution as to whether it intended to disclose items from the Main Case, which related to the information transmitted from the Independent Counsel, to the Defence in the Article 70 case (or to seize Trial Chamber III with a request to vary the protective measures/confidentiality), the Prosecution simply responded that the Defence for Mr. Bemba already had access, so it did not intend to take any further steps, (See Annex A). This obviously leaves no remedy for the other Article 70 Defence teams.

12. If Trial Chamber III rejects a request for access in the Main Case, the Article 70 Defence teams have no standing to seek leave to appeal as concerns a decision issued in a different case.⁴

13. Trial Chamber III also cannot assess what remedies might be necessary in case of late disclosure, or in case certain protective measures, which cover relevant information, cannot be lifted. In this regard, the fact that the Defence might eventually receive the material from Trial Chamber III should not excuse the Prosecution's from any sanctions which should attach to their independent failure to disclose the same materials in a timely manner.

14. The Prosecution has access to both cases. The Article 70 team includes persons who are also assigned to the Prosecution Main Case. It is better placed to identify what could be relevant to the Defence, in an expeditious and efficient manner.

15. Placing the burden instead on the Defence (and Trial Chamber III) delays the disclosure process, and forces the Defence divert its time and resources to develop arguments as to why it should be given access to materials, which should have been disclosed directly by the Prosecution.

16. This turns the rationale of vesting the ICC Prosecution with such wide-ranging powers and resources on its head, and runs contrary to the statutory duty of the Prosecution in Article 54(1) to investigate incriminating and exculpatory issues equally. This duty was considered by the drafters to be a key safeguard as concerns the principle of equality of arms.⁵

⁴ ICC-01/05-01/08-3152, para. 5.

⁵ M. Bergsmo P. Krueger, 'Duties and Powers of the Prosecutor' Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716. See also ICC-01/04-01/06-1486, para. 42.

17. To the extent that the decision appears to exempt the Prosecution from the consequences of its failure to disclose Article 67(2) and Rule 77 materials from the Main Case, it necessarily impacts on the principle of equality of arms and the fairness of the proceedings.

18. Finally, the Defence concurs that appellate intervention is necessary to eliminate likely prejudice, and to resolve a clear ambiguity as concerns the Prosecution's disclosure obligations.

19. In this regard, the Defence notes that in its submission before Trial Chamber III, the Prosecution averred that:

[REDACTED].⁶

20. In making this submission, the Prosecution has invited the possibility that Trial Chamber III might rule in a manner, which is directly contrary to Trial Chamber VII. This would leave the Defence with no remedy from either Chamber.

21. Immediate appellate intervention is therefore required to receive clarity and certainty as to this crucial issue.

Relief sought

22. For the reasons set out above, the Defence for Mr. Bemba requests the Honourable Trial Chamber to grant the 'Leave to Appeal Decision on Defence Requests for Disclosure (ICC-01/05-01/13-1188)'.

⁶ ICC-01/05-01/08-3291-Conf-Exp, para. 10.



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Date this 3rd day of September 2015

The Hague, The Netherlands