

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 17 December 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 Document
with**

Confidential, *EX PARTE*, only available to the Prosecution, Annex A

Public redacted version of “Prosecution’s Response to “Defence Request for disclosure of further material”, 14 December 2015, ICC-01/05-01/08-3307-Conf

Source: The 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
Mr James Stewart
Mr Jean-Jacques Badibanga

Counsel for the Defence of Jean-Pierre Bemba Gombo

Mr Peter Haynes
Ms Kate Gibson
Ms Melinda Taylor

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Defence Request for Trial Chamber III (“Chamber”) to order the Prosecution to disclose: (i) records of contact between the Prosecution and Defence Witness 55 (“D55”); (ii) requests for assistance sent to state authorities (“RFAs”) concerning Defence witnesses and team members; and (iii) material relating to financial records received from the Western Union’s Global Investigations Department (“Financial Records”).¹ The Defence submits that this information, which was disclosed by the Prosecution in the case against *Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba et al.* (“Article 70 Case”), is material to the Defence preparation in this case under rule 77 of the Rules of Procedure and Evidence (“Rules”).²

2. The Defence Request is without merit and should be rejected. The Defence fails to establish the *prima facie* materiality of the information sought to Defence preparation.³ Moreover, the Defence has access to that information, as it has been disclosed to the Accused in the Article 70 case. The Defence is entitled to rely on it without formal disclosure in the main case.

3. The Defence request for disclosure of material not disclosed in the article 70 case – including any material generated from contacts with D55 and all Requests for Assistance (“RFAs”) concerning Defence witnesses in the main case - is vague, general and unsubstantiated. The Defence attempts to re-litigate its previous requests, which were rejected by the Chamber.⁴

¹ ICC-01/05-01/08-3305-Conf, “Defence Request for disclosure of further material” 20 November 2015, para.3 and 47. (“Defence Request”)

² *Ibid.*, paras. 12 and 47.

³ See ICC-02/05-03/09-501 OA4, 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, 28 August 2013, para. 42 (“Banda Appeals Decision”).

⁴ See ICC-01/05-01/08-3100, “Decision on Defence requests for disclosure”, 2 July 2014, paras. 29-30.

II. Request for Confidentiality

4. Pursuant to regulation 23(2) *bis* of the Regulations of the Court, the Prosecution requests that this document be received as “Confidential,” as it responds to the Defence Request, which bears the same classification. The Prosecution also requests that Annex A be received as “Confidential, *EX PARTE*, only available to the Prosecution”, as it is the non-redacted version of a document to which Trial Chamber VII has authorised redactions.

III. Procedural History

5. Since 16 January 2014, the Defence in this case has sent no fewer than 15 letters to the Prosecution seeking information on the Prosecution’s investigation into article 70 offences.

6. Since 20 March 2014, the Defence filed numerous requests for disclosure, *inter alia*, of material related to the Article 70 case.⁵

7. On 6 November 2015, the Defence sent an email to the Prosecution requesting disclosure of RFAs, Financial Records and document CAR-OTP-0089-1332.

8. On 13 November 2015, the Prosecution responded that both the Accused and a member of the Defence team in the Article 70 case are already in possession of the aforesaid documents, further to disclosure in that case. The Accused can therefore

⁵ ICC-01/05-01/08-3020-Red, Public Redacted Version of Defence Request for Disclosure, 20 March 2014, paras. 40-44 and 67, whereby the Defence requested, *inter alia*, disclosure of requests for assistance directed to the Democratic Republic of Congo. ICC-01/05-01/08-3033-Red, Public Redacted Version of Defence Further Request for Disclosure, 7 April 2014, para. 16, whereby the Defence requested disclosure of materials relevant to the Article 70 case. Both requests were rejected by the Chamber. See ICC-01/05-01/08-3100, Decision on Defence requests for disclosure, 2 July 2014. See also ICC-01/05-01/08-3264-Conf, Further Defence Request for Disclosure, 7 July 2015, para. 25, whereby the Defence requested disclosure of all material in Prosecution’s possession relevant to the credibility of Defence witnesses in the Main Case.

share those documents with his Counsel in the main case, and introduce them therein, if he deems it to be in his interest.

9. On 20 November 2015, the Defence filed the present Defence Request.

IV. Prosecution's Submissions

1. Remarks about the Defence Request

10. The material requested by the Defence is not material for defence preparation and is therefore not disclosable according to the ICC legal framework. The Accused is charged with different crimes in two separate and distinct cases before this Court. What constitutes an issue in the Article 70 case does not necessarily constitute an issue in the main case. Therefore, contrary to the rationale underlying the Defence Request, disclosure of information in the Article 70 case does not automatically trigger disclosure obligations in the main case.

11. The Defence seems to confuse the Prosecution's previous practice and disclosure obligations.⁶ Further to a case-by-case assessment, the Prosecution previously disclosed in this case some materials, which were disclosed in the Article 70 case. This does not create an unlimited obligation to disclose each and every document that the Prosecution either possesses or generates as an internal product, unless it is of exculpatory nature or material for defence preparation.

12. The Defence is also misquoting Decision 3070⁷ whereas it contends that material generated in the course of contacts between Prosecution and Defence

⁶ ICC-01/05-01/08-3305-Conf, para. 9.

⁷ ICC-01/05-01/08-3070, Decision on the "Defence Motion on Prosecution contact with its witnesses", 22 May 2014.

witnesses must be disclosed.⁸ The Chamber's ruling is significantly different: in principle, items generated in the course of those contacts may be material for defence preparation.⁹ No automatic obligation, however, stems therefrom. It is for the Prosecution to assess whether or not any generated item is subject to disclosure.

13. The Defence contends that, despite having access to documents disclosed in the Article 70 case, it is not entitled to rely on those documents without formal disclosure in the main case. As noted by the Chamber in Decision 3070,¹⁰ the Single Judge of Pre-Trial Chamber II ruled that the assumption that there is a separation between a defendant and his or her counsel is inaccurate. The Single Judge observed that "Jean Pierre Bemba has indeed access to all of documents which his Counsel in the Main Case wishes to access, and is therefore entitled to decide whether, and to what extent, he shall or shall not share such access with his Counsel".¹¹ The Defence argument that formal disclosure in the main case is a requirement is therefore without merit.

2. The details of the Defence Request

a. Material generated out of contacts between the Prosecution and Defence Witness 55, including document CAR-OTP-0089-1332_R01

14. The Defence claims that it approached the Prosecution with "a reasoned request" for disclosure of a log ("document CAR-OTP-0089-1332_R01") summarising contacts between the Prosecution and D 55.¹² The Defence omits to

⁸ ICC-01/05-01/08-3305-Conf, para. 14.

⁹ ICC-01/05-01/08-3070, para. 25.

¹⁰ *Ibid.*, para. 26.

¹¹ ICC-01/05-01/13-338, Decision on the "Defence Request for access to confidential transcripts and filings" dated 1 April 2014 submitted by the Defence for Jean-Pierre Bemba Gombo in case ICC-01/05-01/08, 15 April 2014, pp. 3-4.

¹² *Ibid.*, para. 6.

provide the details of its “reasoned request”.¹³ Contrary to its submissions, the Defence provided no reason or justification for the disclosure of the above-mentioned document in this case.

15. The Defence then filed its Defence Request and, although in possession of that document, misrepresented its content and argued that the non-disclosure of it in this case would amount to violation of disclosure obligations.

16. The Defence argument is without merit. Document CAR-OTP-0089-1332_R01 is not subject to disclosure, as it does not contain information material to the Defence preparation under rule 77 of the Rules. The Defence has failed to substantiate or establish its *prima facie* materiality for disclosure in this case. In fact, this document details attempts by the Prosecution’s investigators to establish contact and schedule meetings with D-55 to conduct an interview or organise his travel to The Hague for his testimony. The jurisprudence quoted by the Defence is not pertinent,¹⁴ as the log of contacts between the Prosecution and D-55 is neither a statement, nor a screening note or an investigator report. It does not contain any substantive information that could be qualified as exculpatory or material to defence preparation.

17. The Prosecution hereby attaches document CAR-OTP-0089-1332, in a non-redacted version, as Annex A. The Prosecution requests the Chamber to assess the document and rule on the Prosecution’s submission regarding its irrelevance to this case under rule 77 of the Rules.

18. The Defence contends that the Prosecution’s submission that it did not contact any Defence witness before the close of the Defence case was false.¹⁵ Being in

¹³ The Defence email read as follows: [REDACTED].

¹⁴ ICC-01/05-01/08-3305-Conf, para. 17.

¹⁵ *Ibid.*, para. 21.

possession of document CAR-OTP-0089-1332_R01, which is a redacted version, the Defence assumes that on 7 June 2013 the Prosecution contacted D-55.

19. The Prosecution hereby reiterates the submission above. The document in question records on that date a contact between the Prosecution and a third party.¹⁶ Accusations of serious misconduct by the other party should be made with caution and should not be founded on assumptions.

20. Furthermore, the Defence request for a non-redacted version of document CAR-OTP-0089-1332_R01 is an attempt to circumvent witness protective measures authorised by Trial Chamber VII under rule 81(1) of the Rules.¹⁷ The disclosure of a non-redacted version would render these witness protective measures futile.

21. As this Chamber has held, the Chamber overseeing the Article 70 case is also bound by article 68(1) of the Rome Statute (“Statute”) to ensure the safety of all witnesses, including any witnesses in the *Bemba* case that come under its purview.¹⁸ The Defence presents no reason as to why this Chamber should deviate from this approach and determine the issue of redactions to a document that is in evidence before Trial Chamber VII.

22. Finally, the Defence Request for disclosure of any other material generated out of the Prosecution’s contacts with D-55 is vague, general and unsubstantiated. The Prosecution has already complied with its disclosure obligations by disclosing in this case the relevant materials originating from its contacts with D-55 in the context of both the main case and the Article 70 case.¹⁹

¹⁶ CAR-OTP-0089-1332 at 1333, 1334.

¹⁷ ICC-01/05-01/08-3305-Conf, paras. 23, 47.

¹⁸ ICC-01/05-01/08-3100, para. 26.

¹⁹ These materials include: CAR-OTP-0056-0315, the statement given by D-55 to the Prosecution in the context of the main case, which [REDACTED]; CAR-OTP-0074-0860, D-55’s statement to the [REDACTED] in the context of the Article 70 investigation, which [REDACTED]; CAR-OTP-0074-0710, [REDACTED].

b. Requests for Assistance (RFAs) to national authorities.

23. The Defence request for disclosure of all the Prosecution's RFAs, and any other documents arising out of contact with national authorities in the context of the Article 70 investigation, is groundless. The Defence claims that disclosure is warranted because the RFAs directly refer to, and concern, Defence witnesses in this case. The RFAs and other supporting information that is directed at national authorities is not *prima facie* material to defence preparation. This Chamber has established that the materiality of RFAs must be assessed on a case-by-case basis and has ruled against such general requests for access to RFAs.²⁰ The Appeals Chamber has held that "the right to disclosure is not unlimited" and the application of rule 77 of the Rules depends on "the specific circumstances of the case".²¹ The burden is on the Defence to establish the *prima facie* basis of the materiality to its preparation.²² Nowhere in the Defence Request does the Defence explain in any concrete terms how it has established a *prima facie* basis for the information sought.

24. The Defence argument that the Prosecution has disclosed RFAs in other cases is equally without merit.²³ The disclosure of RFAs is case specific and depends on the circumstances of each case.²⁴ These general submissions fail to satisfy the materiality threshold required for disclosure of RFAs.

²⁰ ICC-01/05-01/08-3100, para. 29.

²¹ ICC-02/05-03/09-501 OA4, para. 39

²² *Ibid.*, para. 42.

²³ ICC-01/05-01/08-3305-Conf, paras. 25, 26.

²⁴ See generally e.g. ICC-01/09-02/11-T-28-ENG ET, at p. 65, l. 4-11 ([REDACTED]). See also ICC-01/04-01/06-3017 A5 A6, Decision on Mr Thomas Lubanga's request for disclosure, 11 April 2013, para. 11 (noting that the RFA to be disclosed related to a letter pertaining to the determination of the ages of two individuals, an issue in material dispute in that case).

25. The Defence claim of prejudice by the non-disclosure of the RFAs, as they could have supported their abuse of process application, is an attempt to re-litigate matters already adjudicated by the Chamber.²⁵

26. The Defence asserts that the Prosecution's RFAs that provided the names of Defence witnesses to national authorities constitute breaches of Defence immunities. This argument is without merit. Neither the functional immunity of the Defence, nor legal professional privilege has been violated.²⁶ Under the Statute, cooperation with States Parties is an important avenue for conducting investigations. The Prosecution made use of RFAs in the context of judicial cooperation, as provided for by article 93 of the Statute, in order to conduct its article 70 investigation. Throughout its investigations, the Prosecution ensured that its actions neither endangered the safety and security of any witness or third party, nor deterred witnesses from cooperating with the Defence.

27. In particular, the Defence attempt to link the Prosecution's RFA to the Democratic Republic of Congo ("DRC") authorities to the alleged [REDACTED] Defence witness 13 is unfounded.²⁷ It is based purely on speculation rather than discernible evidence.

28. The Defence further contends that the RFAs would support the Defence argument – presented in the abuse of process application – that the Prosecution investigation occurred in the context of the main case.²⁸ This argument is erroneous. Any reference to the main case in the RFAs was made merely because no separate Article 70 case existed at the time of the article 70 investigation, before arrest warrant

²⁵ ICC-01/05-01/08-3305-Conf, para. 27; see ICC-01/05-01/08-3255, "Decision on "Defence Request for Relief for Abuse of Process", 17 June 2015, paras. 19-34.

²⁶ *Ibid.*, paras. 33-34. At para. 33, TC III stated that "This falls far short of demonstrating or substantiating the existence or risk of prejudice to the fairness of the Bemba case or justifying a request for the "exceptional" and "drastic" remedy of a stay of proceedings."

²⁷ ICC-01/05-01/08-3305-Conf, para. 27.

²⁸ *Ibid.*, para. 28.

applications were submitted. RFAs could therefore only refer to the main case, in which alleged offences against the administration of justice were being investigated.

29. Lastly, the Defence argument that the Prosecution violated investigative protocols by contacting protected Defence witnesses²⁹ is another attempt to re-introduce a previous Defence request that was rejected by the Chamber.³⁰ It fails therefore to prove the materiality of the RFAs to Defence preparation.

c. Western Union's Financial Records regarding Defence Witnesses and Team members

30. The Defence request for disclosure of the Financial Records is unsubstantiated.³¹

31. The Prosecution's RFA to the Austrian authorities [REDACTED],³² [REDACTED]. In response, the Prosecution received the Financial Records and accompanying documentation from the Austrian authorities.³³ Though the Defence acknowledged possession of these documents as a result of their disclosure in the Article 70 case, it is unable to establish their materiality or relevance in this case.³⁴ In fact, the information sought by the Defence is material to defence preparation in the Article 70 case, but not in the present proceedings.

32. In attempt to demonstrate the Financial Records' materiality to this case, the Defence asserts that the Financial Records "make explicit reference to the Main

²⁹ *Ibid.*, para. 32.

³⁰ ICC-01/05-01/08-3070, paras. 13-18, and 30(i).

³¹ ICC-01/05-01/08-3305-Conf, paras. 34-41 and 47.

³² [REDACTED]. See CAR-OTP-0091-0351 at 0356-0359; CAR-OTP-0091-0360.

³³ CAR-OTP-0092-0022, CAR-OTP-0092-0027, CAR-OTP-0073-0278 (German); CAR-OTP-0082-1948 (French translation); CAR-OTP-0085-0843 (German); CAR-OTP-0087-0006 (French translation).

³⁴ ICC-01/05-01/08-3305-Conf, paras. 4, 34-41.

Case”³⁵ and were obtained from Western Union to be used in the main case, as allegedly stated by the Prosecution itself.³⁶

33. Both Defence arguments are unfounded. Firstly, the Prosecution’s RFA, when read as a whole and in context, unequivocally clarifies that the Prosecution [REDACTED].³⁷

34. The reference in the RFA to [REDACTED].³⁸

35. To substantiate its second argument, the Defence misrepresents a Prosecution submission made in the Article 70 case.³⁹ The Prosecution clarified that the Financial Records make reference to the main case simply because alleged Article 70 offences had occurred in the main case and no Article 70 case existed at that time, namely in November 2012. Nowhere an inference can be drawn that the Financial Records were to be used in the main case.

36. The Defence claims prejudice because it was supposedly denied the opportunity to confront its witnesses with the Financial Records and/or call alternative evidence.⁴⁰ The Chamber, however, has already determined this issue and ruled that the Defence failed to prove any prejudice in connection with non-disclosure, or late disclosure, of information allegedly impacting on the credibility of Defence witnesses. In fact, the “Prosecution put only open-ended questions to Defence witnesses regarding issues affecting credibility - without particularising

³⁵ *Ibid.*, para. 36. See CAR-OTP-0073-0278 (German); CAR-OTP-0082-1948 (French translation); CAR-OTP-0085-0843 (German); CAR-OTP-0087-0006 (French translation).

³⁶ ICC-01/05-01/08-3305-Conf, para. 38.

³⁷ CAR-OTP-0091-0351 at 0354, para. 5. The RFA states: “... [REDACTED]”.

³⁸ *Ibid.*, at 0354, paras. 1 and 4.

³⁹ ICC-01/05-01/13-T-34-Conf-ENG ET, p. 66, l. 24 to p. 67, l. 3.

⁴⁰ ICC-01/05-01/08-3305-Conf, para. 39.

allegations or presenting or referring to the undisclosed information - on which the Defence was not precluded from following up by a lack of information.”⁴¹

37. The Defence claim of prejudice flowing from the non-disclosure of the Financial Records is at the very least surprising. According to the Article 70 Prosecution case, the former lead counsel, the former case manager and the Accused orchestrated a scheme to bribe witnesses in the main case in exchange for false testimony. Under these circumstances, contrary to the Defence contention, informing the Defence about the criminal activity allegedly performed by the above-mentioned individuals and jeopardising the Article 70 ongoing investigation was not part of the Prosecution’s obligations.

38. Finally, in light of the above-mentioned Chamber’s decision, another Defence argument is without merit. According to the Defence, the questions asked of Defence witnesses by the Prosecution, about receipts of money from the Defence, would show that the Prosecution relied on the Financial Records prior to the official transmission of those documents.⁴² This would make the use of the Financial Records illegal. The Prosecution, however, did not use the Financial Records in this case. As observed by the Chamber, the Prosecution, while examining Defence witnesses regarding credibility issues, neither presented, nor referred to information not disclosed in the main case.⁴³

⁴¹ ICC-01/05-01/08-3255, para. 87.

⁴² ICC-01/05-01/08-3305-Conf, para. 40.

⁴³ ICC-01/05-01/08-3255, para. 87.

IV. Relief Sought

39. In light of the above, the Prosecution requests that the Chamber:

- a) Assess document CAR-OTP-0089-1332 and declare that it is not material for defence preparation in this case;
- b) Reject the Defence Request in its entirety.



Fatou Bensouda, Prosecutor

Dated this 17th Day of December 2015
At The Hague, The Netherlands