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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

Defence Request for Leave to Appeal the 'Decision on Defence request for stay of proceedings and further 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. In 2012, prior to the start of the Defence case, the Prosecution conducted investigations into the credibility of Defence witnesses. They did so knowing that material generated during these interviews (“the Material”) would be immediately disclosable to the Defence.¹ The Material contained information that “may have aided the Defence in its preparation.”² It was only disclosed three years later, in June 2015.³

2. In failing to disclose the Material, the Prosecution breached its obligations under Rule 77 of the Rules of Procedure and Evidence. These breaches caused prejudice to the Defence.⁴

3. In a decision which contains no criticism of the Prosecution’s decision to deliberately withhold Rule 77 material, the Trial Chamber points to the disclosure of some of the Material in another case to which the accused had access, and places the blame on the Defence for failing to mitigate the prejudice it suffered as a result of the Prosecution’s breaches.⁵ The Trial Chamber then determined that the threshold for a stay of proceedings had not been met.⁶ No alternate remedy was discussed.

4. A Trial Chamber has an obligation to ensure the trial is fair.⁷ Disclosure on the part of the Prosecution is universally acknowledged as a key component of a fair trial.⁸ An accused also has a right to an effective remedy for the violation of his

¹ ICC-01/04-01/06-2624, para. 18.

² ICC-01/05-01/08-3335, para. 29.

³ ICC-01/05-01/08-3254 + confAnxA.

⁴ ICC-01/05-01/08-3335, para. 34.

⁵ ICC-01/05-01/08-3335, para. 33.

⁶ ICC-01/05-01/08-3335, para. 35.

⁷ ICC Statute, Article 64(2).

⁸ ICC-01/04-01/07-2288, para. 51, citing ECtHR, Grand Chamber, *Kress v. France*, “Judgment”, 7 June 2001, application no. 39594/98, para. 74; ECtHR, Grand Chamber, *Martinie v. France*, “Judgment”, 13 July 2006, application no. 58675/00, para. 46, Convention for the Protection of Human Rights and

rights.⁹ When the Prosecution receives no sanction, or even judicial criticism, for its deliberate (and repeated) withholding of disclosable material, and an accused receives no remedy for the prejudice the Trial Chamber acknowledges he suffered, it is impossible to continue to assert that the proceedings are proceeding on an equal footing. As such, the Defence brings the following request for leave to appeal the Trial Chamber's decision, for the reasons set out below.

B. REQUEST FOR LEAVE TO APPEAL

Fundamental Freedoms, 4 November 1950, as amended by Protocol 14, 1 June 2010, 213 United Nations Treaty Series 2889, ECtHR, Grand Chamber, *Rowe and Davis v. United Kingdom*, "Judgment", 16 February 2000, application no. 28901/95, para. 60 (citations and references omitted). See also ECtHR, Grand Chamber, *A V. United Kingdom*, "Judgment", 19 February 2009, application no. 3455/05, para. 206, IACtHR, *Castillo Petruzzi et al v. Peru*, "Judgment" (Merits, Reparations and Costs), 30 May 1999, Series C No. 52, para. 141; IACtHR, *Case of the Constitutional Court v. Peru*, "Judgment", (Merits, Reparations, and Costs), 31 January 2001, Series C no.71, para. 83; IACtHR, *Lori Berenson-Mejia v. Peru*, "Judgment" (Merits, Reparations and Costs), 25 November 2004, Series C No. 119, para. 167, ECtHR, Grand Chamber, *A v. United Kingdom*, "Judgment", 19 February 2009, application no. 3455/05, para. 208; ECtHR, Grand Chamber, *Perna v. Italy*, "Judgment", 6 May 2003, application no. 48898/99, para. 29; ECtHR, Grand Chamber, *Elsholz v. Germany*, "Judgment", 13 July 2000, application no. 25735/94, para. 66', see also IACtHR, *Villagran Morales v. Guatemala*, "Judgment" (Merits), 19 November 1998, Series C No. 63, para. 229; IACtHR, *Lori Berenson-Mejia v. Peru*, "Judgment" (Merits, Reparations and Costs), 25 November 2004, Series C No. 119, para. 133; IACtHR, *Bamaca Velazquez v. Guatemala*, "Judgment", 25 November 2000, Series C No.70, para. 189. See also, ICC-01/09-02/11-728, para. 95; ICC-01/04-01/06-1401, para. 77; See also *The Prosecutor v Orić*, Case No. IT-03-68-T, Decision on ongoing complaints about prosecutorial non-compliance with Rule 68 of the Rules, 13 December 2005, para. 20; *The Prosecutor v Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 180; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para. 12; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004.

⁹ See, for example, ICC-01/04-01/07-3003-tENG, paras. 69-70; ICC-01/05-01/08-320, para. 17; Statement of the President of the International Criminal Court (ICC), Judge Silvia Fernández de Gurmendi, on the Occasion of Human Rights Day, 10 December 2015: "Access to impartial, independent justice and the right to an effective remedy are integral elements of human rights, as well as a precondition for the effective protection of other rights and freedoms, as reflected in the Universal Declaration and numerous other human rights instruments."; *Juvénal Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, para. 255; 6 *André Rwamakuba v. The Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, paras. 25, 26; 8 *Laurent Semanza v. The Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, para. 125; 9 *Jean-Bosco Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, 3 November 1999, paras. 74-75; 11 *Prosecutor v. Vidoje Balgojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Balgojević to Replace his Defence Team, 7 November 2003, para. 5; *Prosecutor v. Radovan Karadžić* IT-95-5/18-T, Decision on Accused's Sixtieth, Sixty-first, Sixty-third, and Sixty-fourth Disclosure Violation Motions, 22 November 2011, para. 37; *Case of Chraidi v. Germany*, ECtHR, Application no. 65655/01, Judgement, 26 October 2006, paras. 25-26.

(a) *Conditions for Leave to Appeal*

5. Leave to appeal pursuant to Article 82(1)(d) will be granted if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned decision, and that meets the following two cumulative criteria as set out in that provision:¹⁰

- a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. It must be an issue for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. The Defence notes that the Appeals Chamber has held that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”¹¹

(b) *Identification of Appealable Issues*

7. The Defence submits that the Impugned Decision gives rise to the following identifiable subjects or topics requiring a decision for their resolution, which meet the criteria set out under Article 82(1)(d), and warrant consideration by the Appeals Chamber. These appealable issues are discrete legal questions which arise directly out of the Impugned Decision.

8. The appealable issues identified are as follow:

¹⁰ ICC-01/04-01/07-108, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, 14 December 2007, p.3; ICC-01/04-01/07-116, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, 19 December 2007, p.4.

¹¹ Situation in the Democratic Republic of the Congo, "Judgment on the Prosecutor's Application For Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

- (i) Whether the Trial Chamber erred in accepting that the Defence was prejudiced by the Prosecution's disclosure violations, but failing to provide a remedy, given the established principle that "any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy."¹²
- (ii) Whether the Trial Chamber's repeated excusal of the Prosecution's non-disclosure on the basis that similar information was **later** made available to the Defence from another source,¹³ erroneously limits the Prosecution's disclosure obligations to material which is not available elsewhere in the trial record, in violation of a plain reading of the Statute and Rules, and the jurisprudence of the Appeals Chamber;¹⁴
- (iii) Whether this erroneous standard will have the effect of encouraging the Prosecution to delay or avoid disclosure on the basis that similar information may later become available to the Defence, and will deny the Defence the opportunity to bring corroborated evidence before the Trial Chamber;

¹² *Laurent Semanza vs. The Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, para. 125. See also ICC-01/04-01/07-3003-tENG, paras. 69-70; ICC-01/05-01/08-320, para. 17; *Juvénal Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, para. 255; 6 *André Rwamakuba v. The Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, paras. 25, 26; 8 *Laurent Semanza v. The Prosecutor*, ICTR-97-20-A, Decision, 31 May 2000, para. 125; 9 *Jean-Bosco Barayagwiza v. The Prosecutor*, ICTR-97-19-AR72, Decision, 3 November 1999, paras. 74-75; 11 *Prosecutor v. Vidoje Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Balgojević to Replace his Defence Team, 7 November 2003, para. 5; *Prosecutor v. Radovan Karadžić* IT-95-5/18-T, Decision on Accused's Sixtieth, Sixty-first, Sixty-third, and Sixty-fourth Disclosure Violation Motions, 22 November 2011, para. 37; *Case of Chraidi v. Germany*, ECtHR, Application no. 65655/01, Judgement, 26 October 2006, paras. 25-26.

¹³ ICC-01/05-01/08-3335, paras. 24, 28.

¹⁴ ICC-02/05-03/09-501, para. 40.

- (iv) Whether the Trial Chamber erred in finding that a remedy was not warranted due to disclosure in a parallel case in June 2014,¹⁵ when the prejudice identified by the Defence stemmed from non-disclosure of the Material **prior** to the presentation of the Defence case, rendering the precise timing of the post-testimony disclosure irrelevant;
- (v) Whether the Trial Chamber's finding that the Material provides only limited and general information on the allegations against D-51, ignores the fact that even limited and general information would have afforded the Defence the opportunity to locate more specific and thorough information, in line with purpose of disclosure prior to testimony.

(c) Satisfaction of the Conditions for Leave to Appeal

9. Each of these identified appealable issues significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial.

10. The Trial Chamber's retroactive authorisation of the Prosecution's Rule 77 violations, and the lack of any remedy despite a finding of prejudice, go directly to the fairness of the proceedings. A direct link exists between disclosure and a fair trial. The Prosecution possesses superior investigative capabilities and greater resources than those made available to the Defence. These inherent inequities are counterbalanced by an explicit statutory obligation on the Prosecution to investigate both incriminating and exonerating circumstances equally, and a requirement that the Prosecution disclose all information in its possession that is material to the preparation of the Defence.

¹⁵ ICC-01/05-01/08-3265-Red, para. 33.

11. The record of this case reveals a litany of disclosure violations on the part of the Prosecution which amount to a practice of deliberately withholding material from the Defence. Against this backdrop, the Trial Chamber's failure to remedy conduct which goes to the core of the accused's fundamental rights, undermines the fair continuation of the trial.

12. The appealable issues also affect the expeditious conduct of the trial. The Appeals Chamber previously underlined that:¹⁶

A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back.

13. In this context, an immediate resolution by the Appeals Chamber would materially advance the present proceedings. If it is indeed the case that the Trial Chamber erred in failing to provide a remedy despite a finding of prejudice to the accused's preparation, or the Trial Chamber erred in finding that post-facto disclosure in parallel proceedings absolves the Prosecution of obligations in front of this Trial Chamber, the continuing passage of time will continue to deplete the remedial options available. Correcting the Trial Chamber's errors in the appellate phase of the proceedings will ensure the trial's integrity and ensure the accused receives the remedy to which he is entitled.

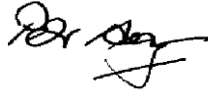
C. RELIEF REQUESTED

14. For the reasons set out above, The Defence respectfully requests that the Chamber:

¹⁶ ICC-01/04-168, para. 16.

GRANT the Defence Request for Leave to Appeal the Impugned Decision, in terms of the issues identified herein.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands, 14 March 2016