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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 requests for 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:

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for the Victims

Paolina Massidda

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

A. INTRODUCTION

1. By way of its “Decision on Defence requests for further disclosure”,¹ the Trial Chamber rejected, *inter alia*, Defence requests for disclosure of:

(a) requests for assistance to state authorities (“RFAs”) concerning Defence witnesses and Defence team members;² and

(b) material relating to the Prosecution’s procurement of financial records from Western Union’s Global Investigations Department.³

2. These documents, in the Defence submission, are disclosable pursuant to the jurisprudence of the ICC, and are directly relevant to the question of the legality of the Prosecution’s investigations in the present proceedings. Given that their disclosure is an essential element of a fair trial of the accused, the Defence brings the following request for leave to appeal the Impugned Decision.

¹ ICC-01/05-01/08-3336 (“Impugned Decision”).

² CAR-OTP-0091-0351; CAR-OTP-0091-0360; CAR-OTP-0091-0371; CAR-OTP-0091-0380; CAR-OTP-0091-0385; CAR-OTP-0091-0410; CAR-OTP-0091-0419; CAR-OTP-0091-0437; CAR-OTP-0091-0439; CAR-OTP-0091-0444; CAR-OTP-0091-0445; CAR-OTP-0091-0449-R01; CAR-OTP-0091-0450; CAR-OTP-0091-0455; CAR-OTP-0091-0460-R01; CAR-OTP-0091-0465-R01; CAR-OTP-0091-0307-R01; CAR-OTP-0091-0312-R01; CAR-OTP-0091-0317-R01; CAR-OTP-0091-0320-R01; CAR-OTP-0091-0326-R01; CAR-OTP-0091-0331-R01; CAR-OTP-0091-0333-R01; CAR-OTP-0091-0469-R01; CAR-OTP-0091-0473-R01; CAR-OTP-0091-0477-R01; CAR-OTP-0091-0481-R01; CAR-OTP-0091-0486-R01; CAR-OTP-0091-0491-R01; CAR-OTP-0091-0496-R01; CAR-OTP-0091-0501-R01; CAR-OTP-0091-0677-R01; CAR-OTP-0091-0707-R01; CAR-OTP-0091-0344; CAR-OTP-0091-0339; CAR-OTP-0091-0539; CAR-OTP-0091-0546; CAR-OTP-0091-0551; CAR-OTP-0091-0556; CAR-OTP-0091-0561; CAR-OTP-0091-0566-R01; CAR-OTP-0091-0571-R01; CAR-OTP-0091-0576; CAR-OTP-0091-0583; CAR-OTP-0091-0588; CAR-OTP-0091-0594; CAR-OTP-0091-0599; CAR-OTP-0091-0604; CAR-OTP-0091-0679; CAR-OTP-0091-0683; CAR-OTP-0091-0511-R01; CAR-OTP-0091-0520-R01; CAR-OTP-0091-0529-R01; CAR-OTP-0091-0609; CAR-OTP-0091-0615-R01; CAR-OTP-0091-0620-R01; CAR-OTP-0091-0624-R01; CAR-OTP-0091-0629-R01; CAR-OTP-0091-0634-R01; CAR-OTP-0091-0657-R01; CAR-OTP-0091-0662-R01; CAR-OTP-0091-0667-R01; CAR-OTP-0091-0672-R01; CAR-OTP-0091-0697-R01; CAR-OTP-0091-0701-R01.

³ CAR-OTP-0092-0018, CAR-OTP-0092-0021; CAR-OTP-0092-0022; CAR-OTP-0092-0027; CAR-OTP-0092-0028; CAR-OTP-0092-0033; CAR-OTP-0092-0035.

B. REQUEST FOR LEAVE TO APPEAL

(a) *Conditions for Leave to Appeal*

3. 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:⁴

- 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.

4. 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.”⁵

(b) *Identification of Appealable Issues*

5. 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.

⁴ 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.

⁵ 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.

6. The appealable issues identified are as follow:

- (i) Whether a reasonable Trial Chamber would accept “the Prosecution's explanation” of the content of its contacts with D-2 and D-3,⁶ while being in possession of information that the Prosecution had given directly contradictory accounts of the contents of this contact;⁷
- (ii) Whether the Trial Chamber erred in failing to consider the Defence submissions that “the content of the RFAs were directly relevant to the Defence’s pleadings on abuse of process”,⁸ particularly in light of its erroneous conclusion that the Defence “does not make any submissions as to why the RFAs themselves are material to the preparation of the Defence”;⁹
- (iii) Whether the Trial Chamber’s finding that the Defence submissions concerning: (a) the divulgation of the list of Defence witnesses to Western Union; and (b) the disclosure of witness identities to the DRC authorities, do not “necessarily contradict the Prosecution's submission that no information divulged to external sources ‘identified Defence witnesses as such’”,¹⁰ can stand in light of the Chamber’s failure to consider the first half of the Prosecution’s incorrect assertion that it disclosed “[n]o confidential information concerning the Defence case”;¹¹
- (iv) Whether any reasonable Trial Chamber could accept the Prosecution submission that “no information divulged to external sources

⁶ ICC-01/05-01/08-3336, para. 34.

⁷ ICC-01/05-01/08-3310-Conf, para. 5.

⁸ ICC-01/05-01/08-3305-Conf, para. 27.

⁹ ICC-01/05-01/08-3336, para. 54.

¹⁰ ICC-01/05-01/08-3336, para. 54.

¹¹ ICC-01/05-01/08-3016-Conf-AnxB, p.18.

‘identified Defence witnesses as such’¹²,¹² in light of (a) the timing of the Prosecution RFAs, and (b) the cause and effect of this disclosure to, at a minimum, the DRC authorities.¹³

(c) Satisfaction of the Conditions for Leave to Appeal

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

8. A direct link exists between disclosure and a fair trial.¹⁴ More than this, the documents at issue are directly relevant to the legality and propriety of the Prosecution’s investigations in the present proceedings, and as such are directly relevant to Defence submissions on abuse of process and the overall fairness of the case. The Prosecution’s deliberate non-disclosure of these documents, despite

¹² ICC-01/05-01/08-3336, para. 54.

¹³ ICC-01/05-01/08-3305-Conf, para. 27.

¹⁴ 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 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.

jurisprudential precedent for the disclosure of such materials,¹⁵ render the appealable issues directly relevant to the fairness of these proceedings.

9. 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.

10. 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 order disclosure of documents which are of undoubted relevance to abuse of process submissions and will, in all likelihood, form a central part of any appeal from conviction, a decision at this stage will avoid the case proceeding on an improper footing.

C. RELIEF REQUESTED

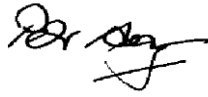
11. For the reasons set out above, The Defence respectfully requests that the Chamber:

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

The whole respectfully submitted.

¹⁵ ICC-01/04-01/06-3017, para. 11; ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275. In the Katanga case, pursuant to Rule 77, the Prosecution disclosed correspondence between OTP and DRC concerning the provision of evidence and assistance to the DRC; ICC-01/04-01/07-949, footnote 41.

¹⁶ ICC-01/04-168, para. 16.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands, 15 March 2016