

**Cour
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**International
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Court**

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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 Redacted Document

Public redacted version of "Prosecution's Response to 'Further Defence Request for Disclosure'", 28 July 2015, ICC-01/05-01/08-3275-Conf-Exp

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I. Introduction

1. Trial Chamber III (“Chamber”) should reject the latest Defence request for the Office of the Prosecutor (“Prosecution”) to: (i) immediately disclose interview records of Prosecution Witness 261 (“P-261”); (ii) disclose all items generated during contacts with Defence Witnesses 2 and 3 (“D-02” and “D-03” respectively); and (iii) provide access to material, supposedly undisclosed, related to the credibility of Defence witnesses in this case.¹

2. The Defence request regarding P-261 is a parallel attempt not only to litigate before this Chamber disclosure and witness protection issues in the ICC-01/05-01/13 case (“Article 70 case”), but also to circumvent witness protection orders issued by Trial Chamber VII (“TC VII”). Furthermore, the Defence request is based on unfounded claims that, within the context of the Article 70 case, the Prosecution is in possession of undisclosed material that the Defence is entitled to receive.² The material is either not material to Defence preparation, is not within the possession or under the control of the Prosecution, or does not exist.

II. Request for Confidentiality

3. Pursuant to regulation 23(2)*bis* of the Regulations of the Court, the Prosecution requests that this document be received as “Confidential, *Ex Parte*, only available to the Prosecution and the Defence”, as it responds to the Defence Application, which bears the same classification.

¹ ICC-01/05-01/08-3264-Conf-Exp.

² *Ibid.*, paras.1-2.

III. Submissions

a) Interview records of P-261

4. The Defence request is an attempt to circumvent the orders of TC VII authorising delayed disclosure of the identity and interview records of P-261 in the Article 70 case, pending implementation of protective measures by the Victims and Witnesses Unit (“VWU”).³

5. [REDACTED], the Prosecution filed a request in the Article 70 case for delayed disclosure of P-261’s identity and interview records as a protective measure.⁴ On 15 June 2015, in spite of being privy to the Prosecution’s request, the Defence made an *inter partes* request for the Prosecution to disclose the same information under consideration by TC VII.⁵ In its response, the Prosecution explained that:

“With regard to P-0261 in the Article 70 Case, we note that [REDACTED] requesting delayed disclosure to protect P-0261’s identifying information based on security reasons (see, [REDACTED]). We are mindful of Trial Chamber III’s ruling that redactions ordered in the Article 70 Case will not be affected by its Decision 3070. Thus since a request for protective measures is pending in the Article 70 Case, coupled with the fact that we cannot ignore the reality that some members of the Defence team as currently constituted work on both the Main Case and Article 70 Case, we will only disclose the relevant items related to P-0261 after the Trial Chamber VII has decided on the redactions. Thus the disclosure delay is necessary in order to avoid jeopardising any protective

³ [REDACTED].

⁴ [REDACTED].

⁵ Defence email to Prosecution dated 15 June at 10:21.

measures that may be ordered in that Case and thus render moot a decision from TC VII...”⁶

6. [REDACTED], TC VII authorised delayed disclosure of P-261’s identity and records for a limited period of time, pending implementation of protective measures by VWU.⁷ The Accused and the Defence are aware of the Prosecution’s request for delayed disclosure in the Article 70 case,⁸ the submissions by both Parties, and TC VII’s decision of [REDACTED].⁹ The Defence makes reference to, and quotes, confidential filings which show that it has access to confidential information in the Article 70 case.¹⁰ This is precisely how the Defence knows that P-261 is a Prosecution witness in that case. Apart from Mr Bemba, who is the Accused in both cases, Ms Taylor acts as Bemba’s Lead Counsel in the Article 70 case and as Co-Counsel in this case. She has access to filings and decisions in both cases. The Defence is equally aware that the litigation by both Parties regarding the Prosecution’s Request for delayed disclosure is complete and all that is pending is implementation of protective measures by VWU.¹¹

7. Nevertheless, on 7 July 2015, the Defence seized this Chamber with a parallel request for disclosure of P-261’s interview records.¹² The Defence provides no explanation as to why it cannot wait for VWU’ implementation of TC VII’s orders. Disclosing P-261’s interview records to the Defence in this case, before TC VII’s orders are fully complied with, would violate the current orders issued by that Chamber. This would render TC VII’s orders futile and jeopardise any protective measures that are being implemented by the VWU. In light of these circumstances,

⁶ Prosecution email to Defence dated 16 June 2015 at 15:55.

⁷ [REDACTED].

⁸ ICC-01/05-01/08-3264-Conf-Exp, para.9. Moreover some members of the Defence Team represent Bemba in both cases.

⁹ [REDACTED].

¹⁰ ICC-01/05-01/08-3264-Conf-Exp, paras.6 and 9.

¹¹ [REDACTED].

¹² ICC-01/05-01/08-3264-Conf-Exp, paras.6-12. [REDACTED].

the Defence fails to explain why *this* Chamber should be exceptionally engaged, considering that the Defence will be in possession of P-261's interview records in a matter of days.

8. The Defence approach effectively disregards the authority of TC VII. The Defence's logic is dangerous, as it effectively results in one Chamber of the Court undermining the authority of another. This very Chamber previously cautioned against such an approach, when it stated that it did not consider it to be in the interests of justice for matters, which may be central to the charges before another Chamber, to be litigated in parallel before it.¹³ Thus, the Defence request should not be entertained by this Chamber. Instead, the Defence should be instructed to raise the issue of access before TC VII.

9. In this sense, TC VII is best placed to decide on all issues of disclosure of the relevant witness, including the timing of any disclosure, as the interview records in question are intended for use in the trial before that Chamber.¹⁴ In addition, P-261 is a witness in the Article 70 case who is yet to testify in that case and thus needs protection. The interview records in question were generated in relation to the charges in that case. The risks that P-261 faces are related to his status as a witness in the Article 70 case, not this case. Moreover, TC VII has already heard arguments by the Parties and has already issued its Decision.¹⁵ Since the presentation of evidence is yet to commence in the Article 70 case, TC VII is well placed to resolve any future risks that may persist until the judgment is rendered in that case. In the circumstances, TC VII is best placed to decide on the issues of access and disclosure, including the extent of delayed disclosure as a protective measure for P-261. The Defence advances no cogent reason as to why this issue should be litigated in parallel before this Chamber.

¹³ ICC-01/05-01/08-3059, para.16

¹⁴ [REDACTED].

¹⁵ [REDACTED].

10. Moreover, this Chamber has previously accorded priority to Pre-Trial Chamber II (“PTC II”), which was seized with the Article 70 case at the pre-trial stage, on matters relating to witness protection and redactions. For instance, this Chamber declined to interfere with any restrictions to disclosure that were authorised by the Single Judge in the Article 70 case.¹⁶ In addition, this Chamber held that PTC II, which oversaw the afore-mentioned case, is bound by article 68(1) of the Rome Statute (“Statute”) to ensure the safety, physical and psychological well-being, dignity and privacy of all witnesses, including any witnesses in the *Bemba* case that come under its purview.¹⁷ The same approach should be adopted on this matter. The Defence presents no reason as to why this Chamber should depart from its earlier rulings on the similar issue of witness protection.

11. As the Defence is well aware of the circumstances necessitating delayed disclosure of P-261’s identity and records, the request in relation to P-261 does not advance the Defence case, but rather wastes the valuable resources of the Chamber. As recently stated by an ICTY Trial Chamber, a defence team should refrain from pursuing peripheral issues, which do not advance their case and should focus on motions where there is demonstrable prejudice.¹⁸

b) Interview records of D-02 and D-03

12. The Prosecution disclosed 19 documents concerning the interviews with D-02 and D-03 on 18 July 2014, but inadvertently omitted to disclose the last two of the

¹⁶ ICC-01/05-01/08-3070, para.26.

¹⁷ ICC-01/05-01/08-3100, para.26.

¹⁸ *Prosecutor v. Radovan Karadzic*, Case No.: IT-95-5/18-T, Decision on Accused’s 101st Disclosure Violation Motion, para.16.

batch of documents concerned. These two documents were subsequently disclosed on 22 June 2015.¹⁹

13. However, it seems that for a period of eight months, the Defence was not even aware that any relevant documents had been disclosed to it,²⁰ as on 22 May 2015 it stated that "... the Defence has yet to receive disclosure of any materials concerning contacts between the Prosecution and Defence witnesses in the present case."²¹ Thus it appears that the Defence had not even perused the documents disclosed and - contrary to the Defence assertion - has not suffered prejudice as a result of the late disclosure of the additional two documents. Moreover, the 19 documents that were disclosed contained sufficient information about the two witnesses, D-02 and D-03.

14. Regarding the audio recordings of interviews,²² the Prosecution considers the content of the disclosed transcripts of recorded interviews to be duplicative of the underlying audio material. As such, the audio recordings were not disclosed absent any dispute arising regarding, for example, the quality of the transcription, or irregularities concerning the interview process. Should the Defence articulate a basis for the review of any specific audio recording as material to its preparation, which is distinct from the content of the transcripts themselves (all of which are in the Defence's possession), the Prosecution would not oppose their inspection as prescribed in rule 77 of the Rules of Procedure and Evidence ("Rules"), except to the extent they may yet require redaction.

¹⁹ The Prosecution disclosed a total of 19 Documents on 18 July 2014. The two witness statements that were inadvertently left out were CAR-OTP-0080-0165 and CAR-OTP-0080-0494.

²⁰ See letter from Defence to Prosecution dated 22 May 2015.

²¹ *Ibid.* [Emphasis added].

²² ICC-01/05-01/08-3264-Conf-Exp, para.18.

c) Phone contacts with D-02 and D-03

15. Phone contacts between investigator [REDACTED] and D-02 and D-03 occurred in April 2014. No relevance or materiality for this case is discernible from those contacts. The purpose of those phone contacts was simply to schedule meetings between the Prosecution and the two witnesses. No substantive information was gathered during such phone contacts. Not every contact with a witness is material to Defence preparation and absent any disclosable content or properly articulated forensic purpose, is not disclosable. As such, there is no founded basis for the Defence request for disclosure of this information.

d) P-31 and D-15 reports

16. The Defence contends that the Prosecution's view of its disclosure obligations is narrow. To substantiate this argument, it refers to the non-disclosure in this case of the investigators' notes regarding meetings with P-31 and D-15.²³

17. The Defence is not automatically entitled to any and every investigator's notes, even when it relates to Defence witnesses. To warrant disclosure, the notes must be material to the preparation of the Defence or contain potentially exculpatory information that is not captured in a formal statement. The same principle applies to information gathered during contact between the Prosecution and any relevant witnesses. This Chamber has previously held "... in relation to screening notes or investigator's notes that the prosecution's duties within the scope of article 67(2) of the Statute and rule 77 of the Rules require fact specific decisions for each interview note or pre-interview assessment, and "critically the prosecution must ensure that if there has been a later formal statement all exculpatory material in the screening notes has been disclosed within the statement, along with any information that is

²³ ICC-01/05-01/08-3264-Conf-Exp, para.21.

material to defence preparation. If this had not occurred, the prosecution must disclose the screening notes, or the relevant information.”²⁴ Thus, a fact-specific assessment is required to determine if an investigator’s note is disclosable.

18. P-31 investigator’s report, regarding a meeting of 21 February 2014, does not contain new nor significant information that is material to Defence preparation.²⁵ The report, *inter alia*, addresses general issues of recruitment, training, and identification of Central African Republic soldiers. The report does not refer to any specific Defence witness, nor does it relate to any contentious issue in this case. The Defence has access to the report – that was disclosed in the Article 70 case - through the Accused and Ms Taylor, Lead Counsel in that case and Co-Counsel in the present case; yet, it has failed to indicate the relevance or materiality of the information to its case before this Chamber.

19. On 16 July 2015, the Prosecution disclosed the investigator’s report regarding a meeting with D-15 on 22 June 2015.²⁶ The purpose of the meeting was to determine whether D-15 was willing to co-operate with the Prosecution in relation to the Article 70 case. The report shows that D-15 was first contacted by the Prosecution in 2011 or 2012, but a meeting did not occur.²⁷ Subsequently, D-15 was contacted by the Defence who interviewed him and even recorded a statement from him.²⁸ Again, the Defence request fails to establish the materiality or relevance of the information contained in D-15’s report to its case before this Chamber.

²⁴ ICC-01/05-01/08-3070, para.25. [Emphasis added]

²⁵ CAR-OTP-0084-0075 was formally disclosed to the Defence in this case on 16 July 2015.

²⁶ CAR-OTP-0090-1779.

²⁷ CAR-OTP-0090-1779 at 1780.

²⁸ CAR-OTP-0090-1779 at 1780.

e) Access to Defence strategy material

20. Throughout this case, the Prosecution has never accessed internal Defence communications or strategy between the Accused and his former case manager, despite judicial decisions stating that such communications are not privileged.²⁹ Although the Prosecution was in possession of intercepted communications or Call Data Records prior to handing this information to an Independent Counsel for review, it never accessed or reviewed these materials. Instead, it treated that material with caution, essentially as potentially containing privileged information.³⁰

21. This Chamber previously considered this issued and ruled that:

“...insofar as the classification of the material referred to throughout the Second Allegation as privileged might indicate that its content includes information advantageous to the Prosecution, and recalling its competence and approach to matters arising out of case ICC-01/05-01/13, the Chamber (i) notes the Single Judge's statement that ‘no privileged document came in the possession of the Prosecution’, and (ii) reiterates its previous finding that there is no reason to doubt the Prosecution's assertion that it ‘is not privy to any information that is protected by legitimate professional privilege’”.³¹

22. The Defence seeks to unnecessarily re-litigate this issue once more based on impermissibly speculative submissions. The Defence refers to the transcript of a phone conversation between Bemba and his former case manager, which occurred on 4 July 2012. The Defence argues that this conversation reveals the Defence strategy in relation to the evidence provided by P-31. It further assumes that the

²⁹ ICC-01/05-01/08-3229-Red2, para.32, citing ICC-01/05-01/08-3080, paras.17-22, 24, 28, and 38. See also ICC-01/05-01/08-3229-Red2, para.32, citing ICC-01/05-01/13-48, paras.4-6.

³⁰ ICC-01/05-01/08-3255, para.73.

³¹ *Ibid.*, para.73.

Prosecution had access to this transcript – and to the internal Defence discussion – when it interviewed P-31 on 21 February 2014. In the Defence view, this would underscore the need to obtain full disclosure of all records of the Prosecution’s contacts with Main Case witnesses.³²

23. However, the Defence assumption is wrong. The transcript in question was first released to the Prosecution by the Independent Counsel in May 2014. The Prosecution only accessed this information following the review of the Independent Counsel and his confirmation that it contained no privileged information. Therefore, the Prosecution did not have access to the said transcript during the interview of P-31, which took place on 21 February 2014. To date, the Prosecution has only received limited material from the Independent Counsel – and only after his assessment that the information is not privileged and relevant to the Article 70 case.

f) The advanced stage of this case and the appropriateness of continuing litigation

24. The Prosecution recognises that the Defence is entitled to raise issues that they consider relevant for its case during trial. It also recognises that disclosure is an ongoing obligation placed on the Prosecution. However, neither of this justifies what already amounts to a practice of disruptive and unnecessary litigation by the Defence at this final stage of the trial proceedings. Much less is that practice justified when the fresh submissions advanced either attempt to re-litigate matters already determined by this or another Chamber of the Court, or merely contain unfounded allegations which find no support on the record of the case. The Trial Chamber is now at the critical juncture of deliberations, and should not be unnecessarily disturbed by spurious litigation.

³² ICC-01/05-01/08-3264-Conf-Exp, para.24.

IV. Relief Sought

25. In light of the above, the Prosecution requests the Chamber to reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 16th Day of March 2016
At The Hague, The Netherlands