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No.: ICC-01/05-01/08

Date: 05/04/2016

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
With Public Annexes A, B and C

**Defence request for disclosure and/or clarification of the timeline for Sentencing
Requests**

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. BACKGROUND

1. The Trial Chamber, in its decision on 21 March 2016,¹ accepted the Defence submissions on the benefits of successive filings of Sentencing Requests, and ordered the Defence to file its Sentencing Request within a week of receipt of those filed by the Prosecution and Legal Representative of Victims.²

2. Having received no disclosure from the Prosecution in relation to the sentencing phase, the Defence wrote on 23 March 2016, asking that in order to assist with Defence preparation, the Prosecution immediately disclose “evidence upon which the Prosecution may rely, in particular any witness statements or documents that have not been hitherto disclosed and/or are not part of the trial record.” The Defence noted that while the Prosecution has until 11 April 2016 to present its intention to call any evidence “this deadline does not absolve the Prosecution of its compliance with ongoing disclosure obligations.”³

3. The Prosecution did not respond.

4. The Defence wrote again to the Prosecution on 30 March 2016, asking for an indication of the Prosecution position by close of business the following day.⁴ The Prosecution responded in the following terms:⁵

Please note that we will only be in a position to know which Rule 77 evidence we may rely upon for sentencing after we submit our request on 11th April 2016 **and following the Chamber’s ruling**. The Chamber’s decision on our sentencing request will allow us to determine whether disclosure of additional information for sentencing is necessary.

¹ ICC-01/05-01/08-3344 (“Decision on the sentencing timetable”).

² ICC-01/05-01/08-3344, para. 6.

³ Email Defence to Prosecution dated 23 March 2016 (“Annex A”).

⁴ Email Defence to Prosecution dated 30 March 2016 (“Annex B”).

⁵ Email Prosecution to Defence dated 30 March 2016 (“Annex C”).

B. SUBMISSIONS

a. The Prosecution is in breach of its disclosure obligations

5. The Prosecution's stated position is wholly out of step with the jurisprudence and practice of the ICC regarding the timing of disclosure.

6. The imposition of deadlines for the filing of material does not absolve the Prosecution of its obligations to disclose material in a manner which gives an accused adequate time for the preparation of his defence under Article 67(1)(b) of the Statute, or its obligation to disclose exculpatory material "as soon as practical" under Article 67(2) of the Statute.

7. In the *Mbarushimana* case, the Pre-Trial Chamber confirmed that deadlines for disclosure do not act to permit the Prosecution to refuse to provide the materials up until deadline's expiration. Citing the "paramount principle" that "any and all material, including material covered by article 67(2) of the Statute, shall be disclosed as soon as practicable", the Pre-Trial Chamber held that:⁶

the imposition of [...] deadlines is justified by the need to ensure the expeditiousness of proceedings, and by the fundamental right of the suspect "to be informed promptly and in detail of the nature, cause and content of the charge in a language which [he] fully understands and speaks" (article 67(1)(a) of the Statute). The Chamber also takes note of rule 76(1) of the Rules, which requires that the defence be provided with the names of the prosecution witnesses and copies of their statements "sufficiently in advance to enable the adequate preparation of the defence".

8. This principle has been applied in subsequent cases. Notably, in the *Ntaganda* case, the Single Judge confirmed that deadlines "are only indicative of the minimum time limits a party can avail itself to comply with its disclosure

⁶ ICC-01/04-01/10-87, para. 20.

obligations.”⁷ Her Honour elaborated that deadlines for disclosure must be read in conjunction with, and are subject to Article 67(l)(b) of the Statute which provides that the accused must have adequate time for the preparation of his or her defence. Her Honour held that:⁸

The early initiation of the process of disclosure better guarantees also the expeditiousness of the proceedings, guided by the overarching principle of fairness. For these reasons, the Single Judge expects that the parties fulfil their disclosure obligations as soon as practicable and not only on the date when the deadline indicated by the statutory documents expires.

9. The Defence further notes that the Prosecution’s obligations under Rule 77 encompass an obligation to disclose material which may undermine their own sentencing evidence, and material which may be relevant to mitigation of sentence. To this end, while the Statute and Rules do not provide for particular time limits for the disclosure of exculpatory evidence, the reference to the phrase “as soon as practicable” in Article 67(2) of the Statute should be understood “as being the earliest opportunity after the evidence comes into the Prosecutor’s possession.”⁹

10. By including evidence in its Sentencing Request, the Prosecution will have necessarily evinced an intention to rely on this material. Whether the Prosecution will ultimately be authorised to rely on this evidence is irrelevant to Mr. Bemba’s right to prepare his defence in an expeditious manner. As such, the Defence requests the Trial Chamber to order the Prosecution to disclose (a) all material upon which it may rely, in particular any witness statements or documents that have not been hitherto disclosed and/or are not part of the trial record; and (b) all material in its custody or possession which may undermine its position on sentence or be relevant to mitigation of sentence in the present case.

⁷ ICC-01/04-02/06-47, para. 16.

⁸ ICC-01/04-02/06-47, para. 16.

⁹ ICC-01/04-02/06-47, para. 17.

b. In the alternative, the Trial Chamber should clarify its Decision on the timetable for Sentencing Requests

11. In its Decision on the sentencing timetable, the Trial Chamber accepted the Defence submissions that successive filings would (i) be “in harmony with Rule 141 of the Rules of Procedure and Evidence, which affords the Defence an explicit right to speak last, a principle that has been applied consistently throughout ICC proceedings” and “during the trial phase of the [Bemba] case”,¹⁰ and which would be “consistent with previous practice at the ICC”;¹¹ and would (ii) “encourage [...] efficiency and expeditiousness of the proceedings”, by ensuring that the Defence does not make “unnecessary submissions responding to evidence that is no longer relied upon”.¹²

12. The Trial Chamber was explicit that:¹³

For the submission of the Sentencing Requests, **noting the Defence's arguments on the benefits of successive filings**, the Chamber considers it appropriate to grant the Defence's request to file its Sentencing Request within a week of receipt of the Prosecution's and the Legal Representative's Sentencing Requests.

13. By refusing disclosure of the materials upon which it intends to rely during the sentencing phase until after a ruling by the Trial Chamber on the relevance or appropriateness of its proposed evidence, the Prosecution is undermining the rationale behind successive filings. The Defence's ability to examine, take instructions upon, respond to the Prosecution's request if necessary, and streamline its own sentencing evidence will be undermined without access to the very material upon which such an analysis would be based.

¹⁰ ICC-01/05-01/08-3285, para. 7.

¹¹ ICC-01/05-01/08-3285, para. 8.

¹² ICC-01/05-01/08-3285, para. 9.

¹³ ICC-01/05-01/08-3344, para. 6.

14. As such, and in the alternative to the request in (a) above, the Defence requests that the Trial Chamber clarify its Decision on the sentencing timetable, and order the Defence to disclose its Sentencing Request seven days from the disclosure of all material upon which the Prosecution intends to rely, following a decision from the Trial Chamber.

C. REQUEST

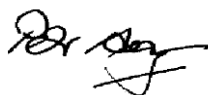
15. In light of the above, the Defence requests that the Trial Chamber:

ORDER the Prosecution to disclose all material upon which it may rely, in particular any witness statements or documents that have not been hitherto disclosed and/or are not part of the trial record; and

ORDER the Prosecution to disclose all material in its custody or possession which may undermine its position on sentence or be relevant to mitigation of sentence in the present case; or, in the alternative,

ORDER that the Defence be required to file its Sentencing Request seven days from receipt of disclosure of the above, following a decision from the Trial Chamber on the Prosecution Sentencing Request.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

5 April 2016