

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 7 November 2016

TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding Judge
Judge Geoffrey Henderson
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

**Public Redacted Document
with
Confidential Annex A**

Public redacted version of "Prosecution's Response to 'Defence Motion for Disclosure Pursuant to Rule 77'", 20 June 2011, ICC-01/05-01/08-1554-Conf

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Defence Motion for Disclosure Pursuant to Rule 77 (“Defence motion”).¹ The Defence motion requests Trial Chamber III (“Chamber”) to compel the Prosecution to disclose to the Defence “all photographic and video material provided to the [Prosecution] by [REDACTED]” pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”).

2. 18 months ago the Prosecution disclosed the photographs and videos along with a witness statement used as incriminatory evidence and referenced the existence of many more photographs. The additional photographic and video items that the Defence belatedly seeks do not add anything material to the preparation of the defence that is not already provided in the items previously disclosed.

3. Thus, the lateness of the request, coupled with the fact that the undisclosed photographs are substantially similar to the previously disclosed photographs, defeats the claim of materiality. Moreover, requiring disclosure at this stage would unreasonably encroach on the legitimate interests of the Prosecution to protect the well-being and security of potential victims and would both cause undue delay in the proceedings and tax the resources of the Prosecution in having to identify and then provide possible protection to the photographed persons, without any conceivable benefit to the Defence.

4. The Defence motion is baseless and without merit and should be denied by the Chamber. Should the Chamber wish to review the undisclosed photographs on an *ex parte* basis, to verify that they are cumulative of what has been disclosed, the Prosecution is prepared to provide the undisclosed photographs to the Chamber.

¹ ICC-01/05-01/08-1460-Conf, Defence Motion for Disclosure Pursuant to Rule 77, 26 May 2011.

II. Background

5. [REDACTED] during the 2002-2003 armed conflict in the Central African Republic (“CAR”). His redacted statement, which referenced video and photographs, was disclosed to the Defence on 10 November 2009. 50 of the photographs were also disclosed,² along with video footage, that same day.³ On 20 July 2010 a less redacted form of [REDACTED] statement was disclosed, along with two additional photographs.⁴ In sum, the Defence received 52 photographs and one video.

6. In his statement [REDACTED] stated that he provided 46 film strips to Prosecution’s investigator⁵ and referred the investigators to five specific undisclosed photographs.⁶ Despite having information since 10 November 2009 about the five photographs specifically mentioned in the statement but not disclosed, and the 46 film strips, the Defence never requested their disclosure.

7. [REDACTED], the Defence sent an email request to the Prosecution for “all negatives, photographs, and all other videotape provided by [REDACTED] ...”.⁷ After the Prosecution declined to produce the requested materials,⁸ the Defence then submitted the instant application to the Chamber.

² ICC-01/05-01/08-606+Conf-Exp-AnxA, Prosecution’s Communication of Incriminatory Evidence disclosed to the Defence pursuant to the Chamber’s Order on disclosure of evidence by the Office of the Prosecutor of 4 November 2009, 11 November 2009 (Batch 21).

³ ICC-01/05-01/08-605+Conf-Exp-AnxA, Prosecution’s Communication of Incriminatory Evidence (Items on List of Evidence attached to “Prosecution’s Summary of Presentation of Evidence”) Disclosed to the Defence on 10 November 2009, 11 November 2009 (Batch 20).

⁴ ICC-01/05-01/08-837+Conf-Exp-AnxA, Prosecution’s Communication of Incriminatory, Potentially Exculpatory and Rule 77 Evidence Disclosed to the Defence on 20 July 2010, 21 July 2010 (Batch 37).

⁵ CAR-OTP-0034-0403 at 0405 where the investigator says “For the record there are 46 film strips, which we also refer to as negatives. These 46 film strips contain individual frames which we will discuss now.”

⁶ CAR-OTP-0034-0341 at 0354 – Photo A; CAR-OTP-0034-0341 at 0357 – Photo B; CAR-OTP-0034-0341 at 0363 – Photo C; CAR-OTP-0034-0369 at 0373 – Photo D; CAR-OTP-0034-0369 at 0378 – Photo E.

⁷ Email from the Defence to Prosecution, 23 May 2011, 15:40, copied to the Chamber.

⁸ Email from the Prosecution to Defence, 24 May 2011, 21:48, copied to the Chamber.

8. The Prosecution has 843 undisclosed photographs from [REDACTED]: 298 are printed on photo paper, and 597 are digital scans of photographs. Some of the undisclosed photographs are of a private nature; the witness intermingled them in the film strips he provided, but they are not relevant to the current proceedings. Of the relevant photographs within the 843 undisclosed photographs, all are repetitive in nature to the 52 disclosed photographs, a fact confirmed by [REDACTED].⁹ Thus, the 52 disclosed photographs are a fair sample of the CAR and *Mouvement de Libération du Congo*-related photographs in the Prosecution's possession. The Prosecution does not intend to rely on any of the undisclosed photographs as incriminatory evidence in these proceedings.

III. Request for confidentiality

9. The Prosecution requests that this filing and its Annex A be received as "Confidential" as they contain sensitive information and are a response to a motion classified as "Confidential."

IV. Submissions

10. The Rome Statute and the Rules are clear that the Prosecution is not required to disclose all of the information collected in a case to the Defence. Rule 77 of the Rules creates very specific principles which govern the disclosure of items: "[t]he Prosecution shall ... permit the Defence to inspect any ... photographs ... in the possession or control of the Prosecutor, which are *material to the preparation of the defence*" The issue to be resolved by the Chamber is whether the undisclosed photographs are material to the preparation of the defence. Under the Rules, the Prosecution makes the initial determination of materiality; the burden of overcoming the Prosecution's determination then should be on the Defence, to make a *prima facie*

⁹ [REDACTED].

showing of materiality, as the law should not be read to require the Prosecution to prove a negative - that the requested photographs are not material.¹⁰

11. The Defence motion fails to demonstrate how the requested photographs are material to the defence preparation. Instead it offers unsubstantiated and conclusory speculation supported only by legal platitudes and claims that the requested photographs provide “direct context for the witness’ statement, and his testimony”. But the witness has already testified, and the 52 disclosed photographs and video provide sufficient “direct context” for that testimony, along with the other evidence in the case. The Defence also speculates that the photographs “may also be relevant to the examination of subsequent witnesses.” This abstract acknowledgement of the existence of the requirement of materiality does not even pretend to identify potential relevance of these photographs instead of or in addition to the ones already disclosed.

12. The Defence does not factually substantiate its claim. Instead it refers to an Appeal Judgment in the *Lubanga* case about the definition of “materiality” found in Rule 77 of the Rules.¹¹ The issue presented in the *Lubanga* case was whether information requested from the Prosecution relating to the general use of child soldiers in the Democratic Republic of Congo (“DRC”) by other armed groups was material to the preparation of the defence. The Appeals Chamber held that the Defence had sufficiently demonstrated that the requested information was material to an understanding of the situation in the DRC during the charged period and to the development of specific possible defences or sentencing considerations.¹² In other

¹⁰ See Prosecutor v. Delali et al., Case No. IT-96-21, Decision on the Motion by the Accused Zejnil Delali for the Disclosure of Evidence, 26 September 1996, para 9. (citations omitted) (holding that the Defence must make a *prima facie* showing of materiality).

¹¹ ICC-01/04-01/06-1433 OA11, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008.

¹² ICC-01/04-01/06-1433 OA11, para. 82 (holding that information related to the general nature use of child soldiers in the DRC is material to the preparation of the defence due to its relevance to assist the defence in understanding the general situation in Ituri, the demobilisation of child soldiers, and to assist for the sentencing phase, if any).

words, it did not assume that the items sought were material simply because the Defence wanted them. The Chamber explained specifically why the information sought bore identifiable indicia of materiality. Here the Defence does not argue, nor could it indeed argue, any concrete basis for materiality, much less that photographs of unidentified persons in unidentified places would help it in preparing specific defences or sentencing considerations.

13. The Appeals Chamber in the *Lubanga* case also noted that the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) confirmed “that the term ‘material to the preparation of the defence’ must be interpreted broadly.”¹³ It is therefore instructive to follow in the footsteps of the Appeals Chamber and refer to the jurisprudence of the ICTY and ICTR, which have both addressed the scope of information that is material to the preparation of the defence.

14. In *Delalić et al.*, an ICTY Trial Chamber provided a detailed review of Rule 66(B)¹⁴ of the ICTY Rules of Procedure and Evidence and Rule 16(a)(1)(C) of the United States’ Federal Rules of Criminal Procedure,¹⁵ both of which are substantially identical to Rule 77 of the Rules.¹⁶ In *Delalić et al.*, cited with approval by the Appeals Chamber, the ICTY Trial Chamber, supported by U.S. federal case law, found that the requested evidence must be “*significantly helpful* to an understanding of

¹³ ICC-01/04-01/06-1433 OA11, para.78.

¹⁴ Rule 66(B) of the ICTY and ICTR Rules of Procedure and Evidence provides: The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

¹⁵ United States FED R. CRIM. P. 16(a)(1)(C) (amended 2002 to FED R. CRIM. P. 16(a)(1)(E)) (amendment provided no substantive change to the meaning of the 1996 version cited in *Delalić et al.*) provides: Upon a request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody, or control of the government, and which are material to the preparation of the defendant’s defense or are intended for use by the government, or were obtained from or belongs to the defendant.

¹⁶ Prosecutor v. Delalić et al., Case No. IT-96-21, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996.

inculpatory or exculpatory evidence; it is material if there is a *strong indication* that ... *it will play an important role* in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal”.¹⁷ Further, the ICTY Trial Chamber found that the Defence, in making a request under Rule 66(B), “may not rely on conclusory allegations or a general description of the information, but must make a *prima facie* showing of materiality”¹⁸ The Defence in *Delalic et al.* had requested all documents in the Prosecution’s possession on the basis that the requested documents were material to its preparation. Since the Defence in *Delalic et al.* failed to specify how the requested documents were material to its preparation, in accordance with the above definition of materiality, the ICTY Trial Chamber denied the Defence motion.

15. Similar to the Defence motion in *Delalic et al.*, the instant Defence motion fails to specify how the requested photographs would assist the Defence in “uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.” Instead of specifying how the requested photographs are material the Defence relies on the term “broadly” in the *Lubanga* case. But the Defence is not offering simply a “broad” interpretation of materiality; rather, the extraordinary breadth of its interpretation effectively eliminates the requirement of materiality altogether. To simply state that Rule 77 of the Rules must be interpreted broadly should not be read as invitation to use the word “broadly” as a legal platitude to claim that anything and everything must be disclosed.¹⁹ This

¹⁷ Id. para 7 (citations omitted, emphasis added).

¹⁸ Id. para 9. (citations omitted).

¹⁹ To be sure the Prosecution decision to deny the Defence request was made in part to ensure fidelity to the Rule 77 requirement that evidentiary items sought by the Defence must be material to the preparation of the defence. There may be instances where a Defence Rule 77 request does not meet the standard of materiality but the Prosecution nevertheless discloses the requested items after deliberately weighing the advantages and disadvantages of contesting a Rule 77 request. At times the Prosecution may choose to waive its right to contest deficiencies in Defence requests with the intent to ensure efficiency in the proceedings or to avoid unnecessary and unproductive litigation over what may amount to a minor issue. That the Prosecution, after deliberation, decides on a case by case basis to waive its right to deny Defence requests under Rule 77 of the Rules should in no way be interpreted to set a legal precedent that requires the Prosecution, as a matter of due course, to waive, deficiencies, such as the deficiencies in the instant Defence motion.

Defence reading of materiality is inconsistent with the Appeals Chamber in the *Lubanga* case and decisions of the other *ad hoc* tribunals. Indeed, the *Bagosora* Decision of the ICTR Appeals Chamber expressly stated that a “plain reading of [material to the preparation of the Defence] does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination”²⁰

16. While understanding that Rule 77 of the Rules should be interpreted broadly it is not an unlimited concept. The contours of Rule 77 have been sufficiently articulated by the Appeals Chamber and other international tribunals. Many items of potential evidence are obtained in a large scale investigation such as the investigation in this case. To expand the categories of evidence that are disclosable to any item of evidence that has no potential to be material to the preparation of the defence badly contorts the intent behind the rules of disclosure, which are carefully crafted and intended to produce balanced, fair, and manageable disclosure results.

17. Moreover, the Defence’s delay in submitting the motion to the Chamber, despite the fact that it has been on notice for 18 months of the existence of the photographs, also belies, substantially weakens, and even waives its materiality claim. The information that the Prosecution was in possession of additional photographic evidence has been available to the Defence since 10 November 2009 when the Prosecution disclosed the statement of [REDACTED] to the Defence – in other words, 18 months before it made its request, [REDACTED], it knew that these photographs existed yet saw no need to seek their disclosure. If the Defence considered the photographs material to its preparation it follows that it would have requested their production [REDACTED].

²⁰ Prosecutor v. Bagosora et al., Case No. ICTR-98-41-AR73, Decision on the Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006, para. 10.

18. The Prosecution stresses that its interest in not disclosing the other photographs lies in the substantial added burden that such disclosure now will impose.²¹ Before disclosing sensitive photographs the Prosecution will be obligated to determine the locations and identities of the photographed persons (civilians in the CAR) and apply for redactions, where necessary, to many of the requested photographs. The Chamber thereafter will have to examine the proposed redactions and rule on the matter. It is unnecessary to impose and undertake such burdens for no discernible benefit.

19. The Chamber should also consider the necessity of the protection of [REDACTED], potential victims, and unidentified Central African civilians. Should the Chamber order the Prosecution to disclose the requested photographs it is unlikely that the photographs, classified as confidential, would be material to the Defence's preparation considering the necessity for restrictions on the use of the photographs in any Defence preparation. However, if disclosed, the photographs would significantly increase the risk to [REDACTED] and possibly others should the Defence wish to show the photographs to potential Defence witnesses who could identify [REDACTED] or others. When the Chamber balances the requested photographs' lack of apparent value to the Defence with the Chamber's duty to protect victims and witnesses the prevailing interest should be the protection of victims and witnesses.

20. The Prosecution has made every effort to comply with the Chamber's recommendation to efficiently present its case and avoid evidence of a repetitive or

²¹ As non-binding illustrations of this concept *see e.g.* United States v. George, 768 F.Supp 56, 58 (D.D.C.,1992) (finding that "[m]ateriality is, to some degree, a sliding scale; when the requested documents are only tangentially relevant, the court may consider other factors ..."). Those factors could include the burden on the government that production would entail, the national security interests or privacy interests at stake, or the ability of the defence to obtain the desired information in another way. *See also* United States v. Wood, 915 F.Supp. 1126, 1134 (D.Kan.,1996) (reversed for reasons unrelated to the materiality ruling).

cumulative nature.²² The 52 disclosed photographs are a fair sample of all of the photographs. The 843 undisclosed photographs - even excluding the ones that are purely private and have nothing to do with this case - are repetitive and cumulative to the 52 disclosed and incriminatory photographs. The Defence already possesses a fair cross-section of all the photographs; the additional photographs would produce no added value for the preparation of the defence.²³ At the same time, disclosure of the requested photographs would likely undermine the Prosecution's efforts to streamline and expedite the proceedings by excluding unnecessary and repetitive evidence, and the process of screening the photographs before disclosure would impose both burden and delay.

21. In the event the Defence motion is granted the Prosecution requests authorization to meet with [REDACTED] to discuss the need for redactions and to fully understand the impact of the release of the photographs on him, on potential victims, and on unidentified Central African civilians. The Prosecution further requests a reasonable amount of time to apply redactions to the undisclosed 843 photographs and to ensure compliance with the consent requirements outlined by the Chamber.²⁴ Additionally the Prosecution would request that the Chamber emplace sufficient safeguards on the use of the photographs to ensure the protected status of [REDACTED] and others.

²² ICC-01/05-01/08-T-14-ENG ET, 7 October 2010, p. 17 and ICC-01/05-01/08-T-25-CONF-ENG ET, 24 September 2010, p. 4.

²³ *See e.g.* U.S. v. Agajanian, 852 F.2d 56, 58 (2d. Cir. 1988) (reiterating that the test for materiality is whether the disclosure would enable the defense to significantly alter the quantum of proof in its favor.) (citations omitted).

²⁴ ICC-01/05-01/08-813-Conf, Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 7 July 2010, para. 85.

V. Conclusion

22. For the above reasons it is respectfully submitted that the Chamber should deny the Defence motion.



Fatou Bensouda, Prosecutor

Dated this 7th Day of November 2016

At The Hague, The Netherlands