

**Cour
Pénale
Internationale**



**International
Criminal
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

Decision on Defence request for stay of proceedings and further disclosure

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

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Unrepresented Victims

**Unrepresented Applicants for
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REGISTRY

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**Victims Participation and Reparations
Section**

**Other
Trial Chamber VII**

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”), issues the following Decision on Defence request for stay of proceedings and further disclosure (“Decision”).¹

I. Background and submissions

1. On 19 June 2015, the Defence for Mr Jean-Pierre Bemba Gombo (“Defence”) filed its “Defence request for a stay of proceedings and request for further disclosure” (“Request”).² In its Request, the Defence requests that the Chamber:³

ORDER the Prosecution to review its archives and disclose all material which is material to the preparation of the defence, including but not limited to that material generated during the course of its investigations into the credibility of Defence witnesses; and

ORDER a stay of proceedings; or, in the alternative

REMAIN SEIZED of the matter in terms of forthcoming Defence requests for investigative assistance, delay of delivery of the Judgement in the present case, and admission of materials generated from investigations into the information contained in the Prosecution’s delayed disclosure.

2. The Defence’s submissions are based on the disclosure, on 8 June 2015, of two investigator’s reports of interviews, conducted in August and October 2012 with P7, a Prosecution “contact” not ultimately called to testify, and Prosecution Witness P31, who testified in the *Bemba* case from 4 to 8 November 2011 (“P31 Report” and “P7 Report”, together “P31 and

¹ The Chamber notes that the present Decision is classified as public. To the extent that this Decision makes reference to confidential or *ex parte* documents and information, the Chamber considers that the information concerned does not warrant confidential treatment at this time.

² Defence request for a stay of proceedings and request for further disclosure, 19 June 2015, ICC-01/05-01/08-3257-Conf. A public redacted version was filed on the same day: ICC-01/05-01/08-3257-Red.

³ ICC-01/05-01/08-3257-Red, para. 47.

P7 Reports” or “Reports”).⁴ The Reports contain information on eight Defence witnesses,⁵ and one Chamber witness.⁶

3. The Defence submits that the Prosecution had “information and material that related to the credibility of witnesses who appeared on the Defence list” that would have aided the Defence in its preparation, and the jurisprudence is “settled and unambiguous” that such material must be disclosed.⁷ Further, the Defence submits that the material’s disclosability was demonstrated “by the very fact of the Prosecution’s current disclosure of it”.⁸ The Defence also contends that the Prosecution not having produced the material during the questioning of Defence witnesses did not entitle it to conceal the material from the Defence.⁹ The Defence argues that the Prosecution “made a strategic choice not to share [the relevant] information with the Defence” and “withheld the resultant material for nearly three years before conceding its disclosability and finally providing it to the Defence pursuant to Rule 77 in June 2015”, which breached the Prosecution’s disclosure obligations, warranting an effective remedy.¹⁰
4. The Defence puts forward a number of actions it argues it could have taken had disclosure been properly effected which “were all closed off by the Prosecution’s non-disclosure”, arguing that “[t]he prejudice is

⁴ CAR-OTP-0072-0476; and CAR-OTP-0084-0079-R01. See ICC-01/05-01/08-3257-Red, paras 3 to 5.

⁵ D64, D57, D52, D51, D4, D11, D23, and D26.

⁶ CHM1.

⁷ ICC-01/05-01/08-3257-Red, paras 13, and 15 to 16, citing *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, para. 18; *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, para. 66; and ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 7.

⁸ ICC-01/05-01/08-3257-Red, para. 6.

⁹ ICC-01/05-01/08-3257-Red, para. 14.

¹⁰ ICC-01/05-01/08-3257-Red, paras 16 to 20, and 27.

concrete, substantiated, and significant”.¹¹ It argues that, had the P31 and P7 Reports been disclosed upon their creation, it could have investigated the allegations as to Defence witnesses’ credibility, cross-checked details, explored inconsistencies, sought further evidence, dropped witnesses from its list, or called alternative or further witnesses to replace or corroborate the proposed testimony of the witnesses in question.¹² It submits it was precluded from taking these steps by the Prosecution’s non-disclosure and thus deprived of the opportunity to present witnesses that would have been more credible and more likely to be accepted by the Chamber.¹³ Further, it argues that the Prosecution put the P7 Report before the Chamber without affording the Defence the opportunity to investigate and counter P7’s claims, and precluded the Defence from addressing any impact on the security of other Defence witnesses of P7’s conduct.¹⁴

5. The Defence also refers to information contained in the P31 and P7 Reports,¹⁵ which it alleges the Prosecution used in its questioning of two Defence witnesses.¹⁶ It argues that, while the Prosecution is entitled to explore lines of questioning arising from information it has received, there are limits when the Prosecution does not intend to put the information into evidential form, and when its late disclosure prevented the Defence from investigating the information’s veracity.¹⁷ Lastly, it submits that the late disclosure of the P7 Report, despite Defence requests

¹¹ ICC-01/05-01/08-3257-Red, paras 20, 24, and 26.

¹² ICC-01/05-01/08-3257-Conf, paras 20, 24, and 26.

¹³ ICC-01/05-01/08-3257-Conf, paras 20, 24, and 26.

¹⁴ Defence Reply to the Prosecution’s Response to “Defence request for a stay of proceedings and request for further disclosure”, 24 July 2015, ICC-01/05-01/08-3274-Red, para 29.

¹⁵ CAR-OTP-0072-0476, at 0479; and CAR-OTP-0084-0079-R01, at 0081.

¹⁶ ICC-01/05-01/08-3257-Conf, paras 21 to 22, and 25 to 26. The Defence refers to the Prosecution’s in-court questioning of D23 and D51: T-333-Conf, page 40, lines 19 to 21, page 42, lines 13 to 17, page 43, lines 19 to 21, and page 44, lines 14 to 21; and T-262-Conf, page 22, line 17 to page 34, line 2.

¹⁷ ICC-01/05-01/08-3257-Red, para. 23.

for its disclosure, hindered the Defence in substantiating its allegations as to abuse of process.¹⁸

6. In terms of a remedy, the Defence submits that “[t]he nature of the Material, its extremely late disclosure, and the current stage of the proceedings, mean that many of the conventional remedies for Prosecutorial non-disclosure have been rendered obsolete”, and gives specific examples and reasons in support of this conclusion.¹⁹ Nevertheless, the Defence argues that “[t]he right to an effective remedy is [...] an absolute right”, and submits that the “only appropriate and available remedy for the Prosecution’s non-disclosure is a stay of the proceedings”.²⁰ It further argues that a stay of proceedings is also warranted due to the Prosecution having created a situation in which the Defence is under an obligation to further investigate, seek further assistance from the Chamber, and request the admission of further evidence, which “would jeopardise the timeliness of the delivery of the judgement”.²¹
7. In addition to a stay of proceedings, the Defence requests further disclosure, on the basis that there is a reasonable belief that other similar material is in the Prosecution’s possession, and notes that the disclosure of the material appears to have been “prompted solely by the fact the Prosecution wishes to rely on the Material in the upcoming trial in the Article 70 Case”.²² Lastly, the Defence submits that “the late stage of the proceedings does not release the Prosecution from its disclosure

¹⁸ ICC-01/05-01/08-3274-Red, paras 42 to 43.

¹⁹ ICC-01/05-01/08-3257-Red, paras 7 and 28 to 30.

²⁰ ICC-01/05-01/08-3257-Red, paras 7 and 31 to 34.

²¹ ICC-01/05-01/08-3257-Red, para. 35.

²² ICC-01/05-01/08-3257-Red, paras 36 to 45.

obligations, nor does it render the disclosure irrelevant to the overall fairness of the trial”.²³

8. On 13 July 2015, the Office of the Prosecutor (“Prosecution”) submitted its “Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’” (“Response”),²⁴ opposing the Request.²⁵ In its Response, the Prosecution submits that it has complied with its Rule 77 disclosure obligations “fairly and in good faith throughout this case”,²⁶ and argues that the Defence’s allegation that it “has developed a practice of systematically failing to meet it[s] disclosure obligations, particularly the disclosure of materials pursuant to Rule 77 of the Rules of Procedure and Evidence”,²⁷ is unfounded.²⁸ Further, it submits that it “disclosed significant information placing the Defence on notice of the credibility challenges to Defence witnesses” and provides details regarding this disclosure.²⁹
9. The Prosecution submits that its Rule 77 disclosure obligations are broad but not unlimited, cites examples where the Chamber rejected Defence requests for disclosure, and concludes that “[t]he Chamber’s rejection of previous requests shows that the Defence is not entitled to everything that was gathered from investigations into its case”.³⁰ The Prosecution submits that it must determine “what information is material to Defence

²³ ICC-01/05-01/08-3257-Red, para. 46.

²⁴ Prosecution’s Response to “Defence request for a stay of proceedings and request for further disclosure”, 13 July 2015, ICC-01/05-01/08-3265-Conf. A public redacted version was filed on 20 July 2015: ICC-01/05-01/08-3265-Red.

²⁵ ICC-01/05-01/08-3265-Red, paras 1 and 44.

²⁶ ICC-01/05-01/08-3265-Red, para. 8.

²⁷ ICC-01/05-01/08-3257-Red, para. 1.

²⁸ ICC-01/05-01/08-3265-Red, para. 9.

²⁹ ICC-01/05-01/08-3265-Red, paras 9 to 11.

³⁰ ICC-01/05-01/08-3265-Red, paras 12 to 15

preparation 'on the basis of all the available information, and including anything revealed to the accused'".³¹

10. The Prosecution submits that the Defence was either on notice or in possession of the information contained in the P31 Report or that such information is "insignificant to understanding" the relevant witnesses' credibility.³² The Prosecution contends, referring to "substantive and compelling information" it had already disclosed, that the Defence's contention that "[t]he entire face of the Defence case may have looked very different, had the accused been given the opportunity to follow the leads now revealed in the Material' [...] is simply a veiled attempt to both abrogate responsibility for Defence witness selection and case presentation, and to test the possibility of a second attempt to bolster the Defence case".³³

11. With respect to the P7 Report, the Prosecution submits that it contains "insignificant general opinion", "insignificant" information which "does not support the Defence argument", or information or credibility challenges which were already known to the Defence.³⁴ Regarding information concerning D23, the Prosecution submits that the information "falls squarely within the article 70 investigation" and argues that it "did not refer to, or particularise, any undisclosed information".³⁵ With respect to information concerning D26, the Prosecution submits that the Defence was made aware of certain credibility challenges, and categorises the information that D26 was not linked to General Bozizé or present in the

³¹ ICC-01/05-01/08-3265-Red, para. 16.

³² ICC-01/05-01/08-3265-Red, paras 19 to 23.

³³ ICC-01/05-01/08-3265-Red, para. 24.

³⁴ ICC-01/05-01/08-3265-Red, paras 26 to 28.

³⁵ ICC-01/05-01/08-3265-Red, para. 29.

CAR during the 2002-2003 conflict as “lead information” which was “important for the article 70 investigation”.³⁶

12. Lastly, the Prosecution submits that, even if the Chamber were to find that the P7 Report contained Rule 77 information, the Defence has not suffered prejudice as a result of its delayed disclosure, noting: (i) other information provided to the Defence, (ii) material disclosed to Mr Bemba in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (“case ICC-01/05-01/13”), and (iii) that because members of the Defence work on both the *Bemba* case and case ICC-01/05-01/13, the Defence “could have had access to the same information over 15 months ago ... [but] chose not to”.³⁷ The Prosecution submits that its “disclosure, coupled with witness questioning in court, put the Defence on sufficient notice about its witnesses’ credibility”.³⁸

13. On 24 July 2015, with leave of the Chamber,³⁹ the Defence filed its “Defence Reply to the Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’” (“Reply”).⁴⁰ In its Reply, the Defence submits that the Prosecution has applied an “erroneously narrow” standard for Rule 77 disclosure by stating that material is only disclosable if it “significantly assists the Accused in understanding issues such as witness credibility”.⁴¹ The Defence contends

³⁶ ICC-01/05-01/08-3265-Red, para. 31.

³⁷ ICC-01/05-01/08-3265-Red, paras 32 to 33.

³⁸ ICC-01/05-01/08-3265-Red, para. 34.

³⁹ The Defence filed its Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’ on 21 July 2015, ICC-01/05-01/08-3271, and the Chamber granted leave to reply in its Decision on “Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’”, 23 July 2015, ICC-01/05-01/08-3272.

⁴⁰ ICC-01/05-01/08-3274-Conf. A public redacted version was filed on the same day: ICC-01/05-01/08-3274-Red.

⁴¹ ICC-01/05-01/08-3274-Red, paras 3 to 6.

that any statement of a Prosecution witness taken prior or subsequent to their testimony is disclosable without more, and its relevance only being “amplified” by discussion of Defence witnesses’ credibility.⁴² Further, the Defence submits that the Prosecution Response “amounts in terms to a confession by silence to the suggestion that many more of these interviews have been conducted and withheld”, and gives examples of witnesses that it alleges the Prosecution “must have [...] re-interviewed”.⁴³ It also draws attention to alleged further contact between the Prosecution and P7, material relating to which it submits has not yet been disclosed.⁴⁴

14. As to the Prosecution argument that the interviews fall within case ICC-01/05-01/13, the Defence submits that the interview with P7 was conducted “in the context of the [*Bemba* case] investigations into Defence witnesses” and that the Prosecution’s attempt to “transform the document” into one falling within case ICC-01/05-01/13 is “not plausible”.⁴⁵ Further, the Defence, citing Rule 81(2), submits that the Prosecution cannot delay disclosure on the basis that such disclosure would “undermin[e] the entire article 70 investigation”.⁴⁶ Citing jurisprudence from the Appeals Chamber, and noting the content of the P31 Report, the Defence argues that “[t]he Prosecution’s attempt to justify non-disclosure of P-31’s report on the basis that it [had previously] disclosed information ‘similar’ to that contained therein, must also fail”.⁴⁷

15. Regarding the prejudice caused by the late disclosure of the P7 Report, the Defence submits that it was prevented from “conduct[ing]

⁴² ICC-01/05-01/08-3274-Red, paras 17 to 18.

⁴³ ICC-01/05-01/08-3274-Red, paras 19 to 22.

⁴⁴ ICC-01/05-01/08-3274-Red, para. 26.

⁴⁵ ICC-01/05-01/08-3274-Red, paras 23 to 25.

⁴⁶ ICC-01/05-01/08-3274-Red, paras 7 to 10, and 30 to 33.

⁴⁷ ICC-01/05-01/08-3274-Red, paras 14 to 16.

investigations into the credibility of [P7], and the claims made in his interview” or exploring the impact of P7’s conduct on the security of Defence witnesses.⁴⁸ It avers that, instead, the Prosecution presented the material to the Chamber without Defence scrutiny.⁴⁹ Finally, the Defence submits that “limited, partial, and late disclosure in the Article 70 Case cannot eliminate the prejudice suffered by the Defence in being deprived of the [P7 Report], and other material, in the very early stages of its Defence Case [in the *Bemba* case]”.⁵⁰

II. Applicable law

16. For the purposes of the present Decision, the Chamber has considered Articles 64(2) and (6)(c), 67(1)(b) and (2), and 68(1) and (5) of the Rome Statute (“Statute”), Rule 77 of the Rules of Procedure and Evidence (“Rules”), and Regulation 20 of the Regulations of the Court.
17. While the Statute does not expressly provide for a stay of proceedings as a remedy, the Chamber recalls its previous decision wherein it noted that the jurisprudence of the Court has confirmed the possibility of a stay of proceedings in certain circumstances.⁵¹ The Chamber recalls that not every alleged infraction of the law or breach of the rights of the Accused will justify a stay of proceedings.⁵² A stay of proceedings is only justified

⁴⁸ ICC-01/05-01/08-3274-Red, paras 29, and 37 to 40.

⁴⁹ ICC-01/05-01/08-3274-Red, para. 29.

⁵⁰ ICC-01/05-01/08-3274-Red, paras 43 to 44.

⁵¹ Decision on “Defence Request for Relief for Abuse of Process”, 17 June 2015, ICC-01/05-01/08-3255, paras 8 to 11.

⁵² ICC-01/05-01/08-3255, para. 10. *See also*, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 30; *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, ICC-01/09-02/11-868-Red, para. 14; *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 77; *The Prosecutor v. Callixte Mbarushimana*, Decision on the “Defence request for a permanent stay of proceedings”, 1 July 2011, ICC-01/04-01/10-264, page 4; and *The Prosecutor v. Thomas Lubanga*

where the situation is such that it is “impossible to piece together the constituent elements of a fair trial”,⁵³ or “it would be ‘repugnant’ or ‘odious’ to the administration of justice to allow the case to continue”.⁵⁴ The Chamber also notes that, in deciding whether the requisite threshold is satisfied, trial chambers enjoy “a margin of appreciation” based on their “intimate understanding of the process”.⁵⁵

III. Analysis

18. The P31 and P7 Reports contain information on eight Defence witnesses,⁵⁶ and one Chamber witness,⁵⁷ predominantly basic information related to the personal and professional history of the individuals, but also certain information more relevant to their credibility. For example, both the P31 and P7 Reports provide information related to D52’s character, behaviour, and past activities, and the P7 Report provides information that D23 was

Dyilo, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011, ICC-01/04-01/06-2690-Red2, paras 162 and 195.

⁵³ ICC-01/05-01/08-3255, para. 10, citing ICC-01/04-01/06-772, para. 39. See also, ICC-01/09-02/11-728, para. 76; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paras 79 to 80; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582, para. 55; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, para. 78; and *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, paras 90 to 91.

⁵⁴ ICC-01/04-01/06-2690-Red2, para. 195; ICC-01/09-02/11-868-Red, para. 14; and ICC-01/09-02/11-728, para. 77.

⁵⁵ ICC-01/05-01/08-3255, para. 11. See also, ICC-01/04-01/06-1486, para. 84; ICC-02/05-03/09-410, para. 86; ICC-01/04-01/06-2690-Red2, para. 167; and ICC-01/04-01/06-2582, para. 56.

⁵⁶ D64, D57, D52, D51, D4, D11, D23, and D26.

⁵⁷ CHM1.

not a “military person” despite being listed in the Defence list of witnesses under “Bozizé’s Fighters”.⁵⁸

19. While the parties make various submissions as to the principles of disclosure,⁵⁹ for the purposes of the present Decision, noting that the Prosecution recently disclosed the P31 and P7 Reports pursuant to Rule 77,⁶⁰ the Chamber will address the question of whether the timing of the Prosecution’s disclosure caused prejudice to the Defence, and if so, whether such prejudice was such that the threshold for a stay of proceedings has been met.

P31 Report

20. Turning to the content of the Reports and whether the timing of their disclosure may have caused prejudice to the Defence, the Chamber notes that the P31 Report contains information on five witnesses, D11, D52, D57, D51, and CHM1, two of whom – D11 and D52 – ultimately did not testify in the *Bemba* case. While much of the information is basic information related to the personal and professional history of the individuals, the P31 Report also contains certain information more relevant to the credibility of the witnesses, for example information related to D51’s and D52’s character, behaviour, and past activities.⁶¹ The Chamber will address the information relating to the concerned witnesses in turn.

⁵⁸ CAR-OTP-0072-0476, at 0479; and CAR-OTP-0084-0079, at 0080 to 0081.

⁵⁹ ICC-01/05-01/08-3265-Red, paras 12, 17 to 19, 26 to 28, 31, and 34; and ICC-01/05-01/08-3274-Red, paras 3 to 10, 14 to 18, 23 to 25, and 30 to 33.

⁶⁰ See Prosecution’s Communication of Evidence disclosed to the Defence on 8 June 2015 pursuant to Rule 77 of the Rules of Procedure and Evidence, 8 June 2015, ICC-01/05-01/08-3254, with confidential annex, ICC-01/05-01/08-3254-Conf-AnxA.

⁶¹ See CAR-OTP-0084-0079, at 0080 to 0081.

21. With respect to the information pertaining to D51, the Chamber notes the Prosecution submission that the Defence already had similar and more detailed information on these issues from prior Prosecution disclosure.⁶² The Prosecution refers to the Bangui Airport flight logs,⁶³ although it does not explain how these logs are relevant to the issue at hand.⁶⁴ In addition, it refers to prior disclosed information concerning allegations that D51 committed certain crimes contained in prior disclosure.⁶⁵

22. Further, the Prosecution refers to the testimony of D51 himself, during which it put questions to the witness on the basis of the abovementioned documents, which the Prosecution cites as further support for the proposition that it disclosed information about allegations that D51 committed certain crimes.⁶⁶ The Chamber notes that while putting such questions to a witness in court cannot, in itself, replace disclosure, it did give the Defence a further opportunity to address these challenges to D51's credibility.

23. Noting the above, as well as that the P31 Report provides only extremely limited and general information on the allegations against D51, the Chamber finds that the Defence suffered no prejudice from the timing of the disclosure of this information.

24. With respect to the information on D57 and CHM1, the Chamber notes that the Defence was already provided with two sets of screening notes for D57, which contain much of the same information as the P31 Report, save for information that he was "a good military officer", "has a calm

⁶² ICC-01/05-01/08-3265-Conf, para. 21, and footnotes 38, 39, and 40.

⁶³ CAR-OTP-0045-0002; and CAR-OTP-0045-0228.

⁶⁴ ICC-01/05-01/08-3265-Conf, para. 21.

⁶⁵ ICC-01/05-01/08-3265-Conf, para. 21, and footnotes 38, 39, and 40, referring to CAR-OTP-0029-0110, at 0112; CAR-OTP-0029-0266; and CAR-OTP-0069-0271.

⁶⁶ ICC-01/05-01/08-3265-Conf, para. 21.

demeanour”, and health information.⁶⁷ In relation to CHM1, the information in the P31 Report relates only to his role and title during the 2002-2003 events and at the time of the interview.⁶⁸ The Defence already possessed such information by virtue of Prosecution disclosure.⁶⁹ As such, the Chamber finds that the Defence was not prejudiced by the timing of the disclosure of the P31 Report in relation to this information.

25. Regarding the information on D11 and D52, originally listed as Defence witnesses, the fact that they ultimately did not testify before the Chamber renders any allegation that the Defence was prejudiced by not having possessed this information moot.

26. In light of the above, the Chamber finds that the timing of the disclosure of the P31 Report caused no prejudice to the Defence’s preparation.

P7 Report

27. The Chamber notes that the P7 Report contains similar information to the P31 Report, including a mixture of personal and professional information regarding D64, D57, D52, D51,⁷⁰ D4, D11, D23, and D26 provided by P7. The P7 Report also includes information going to the character and credibility of some of these witnesses, such as information on their location during the events in the CAR, crimes allegedly committed by them, their loyalties, and information regarding military training of CAR soldiers which took place in the DRC.

⁶⁷ CAR-OTP-0007-0061; and CAR-OTP-0007-0064.

⁶⁸ CAR-OTP-0084-0079, at 0081.

⁶⁹ CAR-OTP-0008-0219; CAR-OTP-0069-0010; CAR-OTP-0069-0043; and CAR-OTP-0069-0045.

⁷⁰ “Apparently”, see CAR-OTP-0072-0476, at 0478.

28. Regarding the training of CAR soldiers in the DRC,⁷¹ while apparently nothing disclosed by the Prosecution covered exactly the same information as that provided in the P7 Report, the Chamber notes that information on this issue was provided in the testimony of D60 and D64.⁷² The fact that the Defence became aware of this issue from another source limits any prejudice which the timing of the disclosure of the P7 Report may have caused. However, the P7 Report provides some different information to that provided in the testimony of D60 or D64.⁷³

29. With respect to the information on D64, the Chamber finds that information as to his loyalty to President Patassé and allegations that he committed various crimes relate to his credibility and as such it may have aided the Defence in its preparation.⁷⁴ The Prosecution's argument that a Defence request relating to self-incrimination indicated that the Defence was "sufficiently aware of possible credibility challenges affecting D64",⁷⁵ is not persuasive. The information in the P7 Report on D57, D51, and D4⁷⁶ is of negligible value to Defence preparation and the Chamber finds no prejudice in the timing of its disclosure. Regarding the information on D11 and D52, who ultimately did not testify, the Chamber recalls its findings above.⁷⁷ Further, allegations that D26 was involved in a killing⁷⁸ were detailed in other Prosecution disclosure.⁷⁹

⁷¹ CAR-OTP-0072-0476, at 0480 and 481.

⁷² **D60**: T-243, page 9, lines 2 to 8; and **D64**: T-259, page 10, line 5 to page 11, line 1.

⁷³ The P7 Report claims that D64 did not receive training at Kotakoli, while D64 claims he did (T-259-Conf, page 10, lines 6 to 22). The P7 Report says that CAR officers received training at Bazabongo and Kinshasa. Additionally, the P7 Report identifies four specific CAR officers who took part in the training and claims the training would "only take place in exceptional circumstances". Finally, while D64 claimed the trainings were conducted in Lingala and French (T-259-Conf, page 10, lines 19 to 22) and D60 speculated that the trainings were in Lingala (T-243-Conf, page 9, lines 9 to 18), the P7 Report states the trainings were conducted in French CAR-OTP-0072-0476, at 0480 and 0481.

⁷⁴ CAR-OTP-0072-0476, at 0477 and 0478.

⁷⁵ ICC-01/05-01/08-3265-Red, para. 28.

⁷⁶ CAR-OTP-0072-0476, at 0478 and 0479.

⁷⁷ See para. 25 above.

⁷⁸ CAR-OTP-0072-0476, at 0478, at 0480.

⁷⁹ CAR-OTP-0073-0623; CAR-OTP-0073-0624; and CAR-OTP-0073-0627.

30. Regarding the information (i) as to D23's character and that D23 was neither part of General Bozizé's rebels nor a military man,⁸⁰ and (ii) that D26 was not in the CAR during the 2002-2003 conflict,⁸¹ the Chamber finds that such information goes to the credibility of these witnesses and may have aided the Defence in its preparation.
31. Turning from the content of the P7 Report, the Chamber notes certain arguments put forward by the Prosecution as demonstrating that no prejudice was caused to the Defence by the timing of its disclosure.
32. First, the Prosecution argues that it did not particularise its allegations on the basis of the material in question and did not refer to or seek to admit the material into evidence, which it argues minimised any potential prejudice to the Defence.⁸² Indeed, the Chamber notes that it has previously taken into account the fact that "the Prosecution put only open-ended questions to Defence witnesses regarding issues affecting credibility – without particularising allegations or presenting or referring to the undisclosed information – on which the Defence was not precluded from following up by a lack of information", in determining that the Defence had failed to demonstrate any prejudice to the fairness of the trial.⁸³ However, in the Request, the Defence submits that, in addition to being precluded from testing the veracity of the Prosecution allegations in court, it could have investigated the allegations as to the credibility of its witnesses, asked D23 further questions, sought further evidence to corroborate his testimony, dropped witnesses from its list, or called alternative or further witnesses.⁸⁴ As such, the alleged prejudice goes

⁸⁰ CAR-OTP-0072-0476, at 0479 to 0480.

⁸¹ CAR-OTP-0072-0476, at 0480.

⁸² ICC-01/05-01/08-3265-Red, para. 29.

⁸³ ICC-01/05-01/08-3255, paras 87 and 90.

⁸⁴ ICC-01/05-01/08-3257-Red, paras 20, 24, and 26.

beyond only difficulties with testing the Prosecution's in-court allegations; thus, the Prosecution not having particularised allegations, referred to the material, or sought to admit the material into evidence, would only have alleviated a part of the alleged prejudice caused. Further, as cited by the Defence,⁸⁵ the Chamber notes that the Prosecution put a number of questions to D23 which contained a "latent suggestion", rather than presenting merely neutral or open-ended questions.⁸⁶ This notwithstanding, the Chamber considers that *with respect to challenges made by the Prosecution to Defence witnesses' credibility during their testimony*, the Defence was able to follow-up on the Prosecution's assertions and was not hindered in this respect by a lack of access to the P31 and P7 Reports.

33. Second, the Prosecution submits that a redacted extract of the P7 Report was disclosed in case ICC-01/05-01/13 on 16 January 2014,⁸⁷ while a full version with redactions to P7's identity was disclosed on 27 June 2014,⁸⁸ thus rendering both available to the Defence through the Accused as of those dates.⁸⁹ The Chamber does not consider that the redaction of P7's identity in this previously disclosed version made the document any less useful to the Defence's preparation.⁹⁰ By virtue of this knowledge the Defence had the opportunity to make submissions as to any alleged prejudice caused by the timing of the disclosure of the P7 Report in the *Bemba* case, and request any relevant remedy, since that date. However, it instead waited almost 12 months before requesting a stay of proceedings, based in part upon the argument that the late stage of proceedings made this the only available and appropriate remedy.⁹¹ The Chamber finds that

⁸⁵ ICC-01/05-01/08-3257-Red, para. 22.

⁸⁶ ICC-01/05-01/08-3257-Red, para. 23.

⁸⁷ ICC-01/05-01/08-3265-Conf-AnxB.

⁸⁸ ICC-01/05-01/08-3265-Red, para. 33.

⁸⁹ ICC-01/05-01/08-3265-Red, para. 33.

⁹⁰ See ICC-01/05-01/08-3274-Red, para. 44.

⁹¹ ICC-01/05-01/08-3257-Conf, paras 28 to 31.

the Defence having gained access to the P7 Report by virtue of disclosure in case ICC-01/05-01/13 minimised any prejudice that may have been caused by the timing of its disclosure in the *Bemba* case and undermines its request for stay of proceedings based thereon.⁹²

34. In conclusion, while the Chamber finds that the timing of the Prosecution's disclosure of the P7 Report may have caused some minimal prejudice to the Defence, it considers the Defence assertion that "[t]he entire face of the Defence case may have looked very different, had the accused been given the opportunity to follow the leads now revealed in the Material",⁹³ grossly overstates the impact of the timing of the Prosecution's disclosure. Instead, the Chamber finds that minimal, if any, prejudice was caused to the Defence. The timing of the disclosure of limited and unsupported information on the credibility of a small number of Defence witnesses, provided by a Prosecution witness and a Prosecution "contact", not submitted or admitted into evidence in the *Bemba* case, could only have caused minimal, if any, prejudice to the Defence's preparation, particularly as the witnesses concerned were questioned in full in court by the Defence, the Prosecution, the Legal Representative(s), and the Chamber, affording all participants, including the Defence, a full opportunity to explore their credibility. Further, as set out above,⁹⁴ the Defence was already on notice of the majority of the relevant information included in the two reports.

35. In light of the above, the Chamber finds that the threshold for a stay of proceedings has not been met. Further, given that only minimal, if any, prejudice was caused to the Defence's preparation, the Chamber does not

⁹² See also, ICC-01/05-01/08-3255, para. 84.

⁹³ ICC-01/05-01/08-3257-Red, para. 20.

⁹⁴ See paras 21 to 29.

consider that any remedy is necessary, warranted, or appropriate in the present circumstances.

Other submissions as to prejudice

36. In addition to the above, the Chamber notes a number of other alleged prejudices cited by the Defence. Regarding the Defence's submissions as to prejudice arising from the P7 Report having been "put [...] before" the Chamber,⁹⁵ the Chamber recalls its findings as to information put before the Chamber but not submitted into evidence,⁹⁶ and thus finds that no prejudice was caused in this respect. In addition, the Chamber finds the Defence's submissions as to it having been precluded from "explor[ing] the impact of the [P7's] conduct on the protection and security of Defence witnesses" are merely speculative.⁹⁷ Lastly, with respect to the submission that the Defence was precluded from raising concrete issues of prejudice in a previous request for stay of proceedings,⁹⁸ the Chamber finds that this submission is unconnected to the relief requested in the Request. The Chamber finds that none of these submissions impact upon its finding above as to whether the threshold for a stay of proceedings has been met.

Further Disclosure

37. In its Request, the Defence also requests further disclosure.⁹⁹ It submits that material of the same type as the P31 and P7 Reports arising from the Prosecution's investigations into Defence witnesses and interviews with those witnesses may remain undisclosed.¹⁰⁰ In this category, the Defence

⁹⁵ ICC-01/05-01/08-3274-Red, para 29.

⁹⁶ See ICC-01/05-01/08-3255, para. 88.

⁹⁷ ICC-01/05-01/08-3274-Red, para 29.

⁹⁸ ICC-01/05-01/08-3274-Red, paras 42 to 43.

⁹⁹ ICC-01/05-01/08-3257-Red, paras 36 to 46.

¹⁰⁰ ICC-01/05-01/08-3257-Conf, paras 37 to 39; and ICC-01/05-01/08-3274-Conf, paras 20 to 22.

refers to undisclosed material arising out of further interviews and contacts between the Prosecution and P7.¹⁰¹ The Prosecution advances no submissions on the Defence's request in this regard.

38. While noting that, as found above,¹⁰² minimal prejudice may have been caused to the Defence by the timing of disclosure by the Prosecution, the Chamber considers that the allegations as to (i) what the Prosecutor may have done in its investigations, and (ii) the material that may have been created as a result, on which the Defence bases this request, are speculative. Therefore, the Chamber does not consider it necessary to order the Prosecution to "review its archives and disclose all material which is material to the preparation of the defence".¹⁰³

39. Lastly, with respect to its request that the Chamber "remain seized" of the matters raised in the Request,¹⁰⁴ the Defence provides no legal basis. Thus, the Chamber does not consider any further orders or findings on its part to be warranted under the present circumstances.

IV. Conclusion

40. In view of the above, the Chamber hereby:

- a. **REJECTS** the Defence request for a stay of proceedings;
- b. **REJECTS** the Defence request that the Chamber order the Prosecution to review its archives and ensure that all material which is material to the preparation of the Defence has been disclosed; and

¹⁰¹ ICC-01/05-01/08-3274-Red, para. 26.

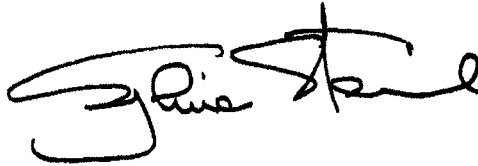
¹⁰² See para. 34 above.

¹⁰³ See ICC-01/05-01/08-3257-Red, para. 47.

¹⁰⁴ ICC-01/05-01/08-3257-Conf, para. 47 (emphasis omitted).

- c. **FINDS** the Defence request that the Chamber “remain seized” of the issues addressed in the Request without legal basis.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 7 March 2016

At The Hague, the Netherlands