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Date: **09 October 2009**

TRIAL CHAMBER III

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elisabeth Odio-Benito
Judge Joyce Aluoch

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

Public with *Ex parte*, Prosecution Only Annex A

Prosecution's submission of summary and relevance of outstanding materials and reasons these have not been filed

Source: **The Office of the Prosecutor**

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

The Office of the Prosecutor	**Counsel for the Defence of Jean-Pierre Bemba** Mr Nkwebe Liriss Mr Aimé Kilolo-Musamba
Legal Representatives of Victims Ms Marie Edith Douzima-Lawson	**Legal Representatives of Applicants**
Unrepresented Victims	**Unrepresented Applicants for Participation/Reparation**
The Office of Public Counsel for Victims Ms Paolina Massidda	**The Office of Public Counsel for the Defence**
States Representatives	**Amicus Curiae**

REGISTRY

Registrar Ms Silvana Arbia	**Defence Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

Introduction

1. At the status conference held on 7 October 2009, the Trial Chamber III ("the Chamber") ordered the Office of the Prosecutor ("the Prosecution") to provide: (i) a list of outstanding materials that it seeks to introduce; (ii) a summary of the ambit of those materials, specifying the issues to which they relate in the case; and (iii) an explanation as to why these materials have not yet been filed.[1]

Request for the Receipt of Annex A as *Ex parte,* Prosecution Only

2. The Prosecution requests that the Chamber receive Annex A appended to this submission as *Ex parte,* Prosecution only because it contains material related to potential Prosecution witnesses whose identities have not yet been disclosed to the Defence and in respect of whom the Prosecution may request protective measures.

Order (i) and (ii) – List of outstanding materials and summary of their ambit

3. In compliance with orders (i) and (ii), the Prosecution submits as Annex A appended to this submission, a list indicating the outstanding materials, in the form of witness statements, that it seeks to introduce and a summary of these materials specifying the corresponding issues of relevance in the case.

4. The Prosecution has focussed this list on witness statements collected since the confirmation hearing was held.

5. In addition, the Prosecution wishes to inform the Chamber that it intends to rely on non-testimonial, including forensic, evidence collected before and after the confirmation hearing. The Prosecution stands ready to provide the Chamber with this additional information.

Order (iii) – Explanation why the materials have not previously been filed

[1] ICC-01/05-01/08-T-14-ENG, page 10, lines 5-10.

6. The Prosecution provided all the materials required to be disclosed in advance of the confirmation hearing in accordance with established jurisprudence, and thereafter did not continue to file the materials collected subsequently.

7. Second, the Prosecution, collected new materials after the confirmation hearing as allowed under both Article 54(1)(a) and (b) of the Rome Statute ("the Statute") and the Appeals Chamber's Judgment in the *Lubanga* case, which acknowledged that the Prosecutor's investigations may continue beyond the confirmation of charges.[2] The Appeals Chamber further held that such investigations may relate to alleged new crimes as well as to alleged crimes that are encompassed by the confirmation hearing.[3] Pursuant to Article 54(1)(a) of the Statute, the Prosecution shall, "[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally." As the Appeals Chamber noted, "the duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecution must be allowed to continue its investigation beyond the confirmation hearing, if this is necessary in order to establish the truth."[4]

8. Post-confirmation investigations may also be necessary to address defense theories that emerge at the confirmation hearing itself. It would be unfair to restrict the Prosecution's ability to respond to the defence by refusing it the leeway to investigate. It is also necessary if, as in this case, the Pre-Trial Chamber confirms on a mode of liability not originally argued or investigated as part of the Prosecution's case. Article 61(9) of the Statute additionally stipulates, *inter alia*, that the charges may be amended before the trial has begun. Collectively, these considerations explain why the investigation should not, and need not, stop at the moment the confirmation hearing begins.

[2] *Prosecutor v. Lubanga*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled Decision Establishing General principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paras. 2
[3] Ibid, paras. 2 and 52.
[4] Ibid, para. 52

9. The continuing collection of new evidence after the confirmation hearing thus being appropriate, immediate submission is not required. Indeed, it would be improper to disclose new information before the confirmation decision is final, including while there exists the possibility of a defence appeal from a decision confirming charges. Filing the evidence with the Chamber after the hearing is concluded would create at least the appearance that the Chamber was receiving information that bears on the confirmation considerations without the opportunity to the Defence to respond. Nor was it necessary, at a time when the possibility exists that confirmation on some or all charges would be denied[5].

10. Thus, there was no requirement to file the evidence between the confirmation hearing and 18 September 2009[6], the day the Pre-Trial Chamber denied the application for leave to appeal the confirmation decision and referred the case to the Trial Chamber.

11. After the Presidency constituted this Trial Chamber, the Chamber had the authority to issue an order regarding filing and disclosure. Article 64(3)(c) of the Statute provides that the Trial Chamber shall provide for disclosure, requiring only that the disclosure be "sufficiently in advance of the commencement of the trial to enable adequate preparation for trial." There was no order until the status conference of 7 October 2009.

12. Additionally, the Prosecution will seek protective measures for some of the witnesses who provide material that the Prosecution will rely upon at trial. Until adequate measures are in place, the Prosecution cannot at this time disclose their identities to the Defence. Though the Prosecution continues to monitor the security situation of each of its witnesses, it submits that witness protection continues to be a concern in this case, particularly in relation to witnesses in the Democratic Republic of Congo.

13. Finally, in order to ensure that the trial is fair and expeditious to all participants, and to assist the Chamber in its determination of the truth, the Prosecution intends to present before the Chamber a case which is focused and complete, setting forth the core evidence upon which it intends to rely upon at trial. It is the Prosecution's objective to

[5] Article 61(7) of the Statute
[6] ICC-01/05-01/08-532

develop its case around a minimum number of witnesses so as to maximize security and efficiency of proceedings.[7] Against this background, the Prosecution continues to review the new materials for relevance and probative value in accordance with Article 69(4) of the Statute and weigh the new evidence against materials previously disclosed to determine which among its body of evidence is most compelling, significant, and likely to assist the Chamber in its determination of the truth.[8]

Conclusion

14. In light of the foregoing, the Prosecution requests that the Chamber accepts its submission of evidence not previously disclosed in accordance with the time-table for disclosure of evidence set out at the status conference of 7 October 2009.

Luis Moreno-Ocampo, Prosecutor

Dated this 9th day of October 2009
At The Hague, The Netherlands

[7] Under Article 68, the Prosecution has an obligation to protect witnesses, victims, family members and others cooperating with the Court as a result of its activities.
[8] ICC-01/04-01/07-1515, para. 26. Trial Chamber II determined that it may use its authority under article 64(3)(c) and (6)(d) and article 69(3) to allow for late submission of evidence if it brings to light previously unknown facts, which have significant bearing on the case and it deems it necessary for the determination of the truth, and as long as it does not jeopardize the defence's right to have adequate time in order to prepare.