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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 with Public Annex A and Public Redacted Annex B

Public Redacted Version of Defence Further Request for Disclosure

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

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

The Office of the Prosecutor Fatou Bensouda Jean-Jacques Badibanga	**Counsel for the Defence** Peter Haynes QC Kate Gibson
Legal Representatives of the Victims Marie-Edith Douzima-Lawson	**Legal Representatives of the Applicants**
Unrepresented Victims	**Unrepresented Applicants (Participation/Reparation)**
The Office of Public Counsel for Victims Paolina Massida	**The Office of Public Counsel for the Defence** Xavier-Jean Keita
States' Representatives	**Amicus Curiae**

REGISTRY

Registrar Herman von Hebel	**Defence Support Section**
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Victims and Witnesses Unit Patrick Craig	**Detention Section**
Victims Participation and Reparations Section	**Other**

A. INTRODUCTION

1. The Prosecution has consistently taken the position that its Article 70 investigation into Mr. Bemba, and his former Lead Counsel and Case Manager, has produced material which is relevant to the present proceedings ("Main Case").[1]

2. Regardless, and even though the Prosecution appears to have been investigating its Article 70 Case since at least November 2012,[2] the Defence has received no disclosure of any material uncovered in the Article 70 investigation.[3] This is despite the fact that the Prosecution has interviewed Defence witnesses,[4] appears to have made requests for assistance from national authorities,[5] and has admitted to being given information that is germane to the protection of Defence witnesses.[6] As such, the Defence has already sought the Chamber's assistance in obtaining disclosure of specific categories of materials.[7] A decision on this request is pending.

3. In the interim, however, the Prosecution has announced publicly that it has disclosed **exculpatory** material in the Article 70 Case.[8] Given the link made by the Prosecution between the Article 70 investigation and the credibility of Defence evidence in the Main Case, these materials must also be disclosable in the present proceedings. In view of the Prosecution's refusal to disclose this material, the Defence now seizes the Trial Chamber.

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[1] See, for example, ICC-01/05-01/08-2910, para. 8.
[2] ICC-01/05-01/08-2412-Conf-Exp.
[3] ICC-01/05-01/13 ("Article 70 Case").
[4] Letter from Mr. Jean-Jacques Badibanga to Peter Haynes QC, 10 March 2014.
[5] Letter from Mr. Jean-Jacques Badibanga to Peter Haynes QC, 21 February 2014.
[6] ICC-01/05-44-Red, para. 10.
[7] ICC-01/05-01/08-3020-Conf, Defence Request for Disclosure, 20 March 2014.
[8] ICC-01/05-01/13-270.

B. BACKGROUND

4. The Prosecution is yet to particularise its case against the five accused in the Article 70 Case. However, from information publicly available, it appears that its case against Mr. Narcisse Arido centres around the production of allegedly false documents in the Main Case ("CAR Documents").[9] The Prosecution has referred to Mr. Arido in public filings as "the witness who may have played a role in forging these documents" [10], and that:

> Narcisse ARIDO…, the first person in the chain of custody of documents the Prosecution believes to be forgeries has received a total of $8.257,13. The amounts paid to ARIDO compared to other witnesses and his status as the source of false documents together suggest that his payment included payments for the production of the documents.[11]

5. The CAR Documents are well known to the participants in the Main Case. They were produced by the Defence and used during the testimony of military expert witness General Jacques Seara, and were also shown to Witnesses D04-59 and CHM-01.[12] The Prosecution has asserted before the Single Judge in the Article 70 Case that "at the same time the Prosecution was receiving this information about the Defence procuring false testimony [July 2012], it noted evidence of false documents included on the exhibit list of the Defence."[13] In fact, it was not the Prosecution who first raised questions about the provenance of the CAR Documents, but rather the Legal Representative of Victims from the Central African Republic, Ms. Douzima-Lawson. The Prosecution completed its questioning of Defence Expert witness General Seara without having raised any objection or challenge to the reliability of these documents, despite the Defence having indicated

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[9] CAR-D04-0003-0128, CAR-D04-0003-0129, CAR-D04-0003-0130, CAR-D04-0003-0131, CAR-D04-0003-0132, CAR-D04-0003-0133, CAR-D04-0003-0134, CAR-D04-0003-0136, CAR-D04-0003-0137, CAR-D04-0003-0138, CAR-D04-0003-0139, CAR-D04.0003-0140 and CAR-D04-0003-0141.
[10] ICC-01/05-44-Red, para. 12.
[11] ICC-01/05-44-Red, footnote 9.
[12] ICC-01/05-01/08-3019-Conf, para. 47.
[13] ICC-01/05-44-Red, para. 12.

in advance of his testimony that it would seek to tender the documents into evidence.[14] As such, the Prosecutions submissions before the Single Judge in the Article 70 Case are not reflective of the reality of the way things unfolded in the Main Case.

6. In any event, following the examination by Ms. Douzima-Lawson, the Prosecution filed an untimely request, several weeks later, alleging that the CAR Documents were "fraudulent" or "very likely forgeries".[15] The Prosecution has never sought to correct or withdraw its allegations that the documents are fraudulent or forged, despite the documents now having been admitted into evidence by the Trial Chamber, over the Prosecution objection.[16]

7. On 18 March 2014, the Prosecution announced publicly that it has disclosed exculpatory materials, "including a media article and other documents related to Narcisse Arido".[17]

8. Upon learning of this disclosure, the Defence wrote to the Prosecution,[18] noting that any material which is considered to be exculpatory in the Article 70 proceedings, would also be exculpatory as concerns the Prosecution's allegations that:

a) Mr. Bemba and members of his Defence, engaged in "witness bribery and coaching";[19] and

[14] List of documents which may be used by the Defence for the purpose of examination of Witness CAR-D04-PPPP-0053, documents 56, 58, 59, 60, 61, 63, 64, 65, 66, 67 and 68.
[15] ICC-01/05-01/08-2301-Conf, 6 September 2013.
[16] ICC-01/05-01/08-3019-Conf, paras. 49-50.
[17] ICC-01/05-01/13-270.
[18] Annex A.
[19] ICC-01/05-01/08-2940, para. 3.

b) Mr. Bemba "and other members of his Defence team consciously and knowingly based their case on false evidence".[20]

9. The Prosecution responded that "our assessment is that this material cannot be considered as exculpatory for Mr Bemba in the main case."[21]

C. SUBMISSIONS

10. Given that the Prosecution's case against Mr. Arido in the Article 70 Case centres around the CAR Documents, it is logical to assume that the disclosed exculpatory material "related to Narcisse Arido" also concerns these documents. The litigation concerning the provenance and reliability of the CAR Documents has been a prominent feature of the Main Case. In admitting them into evidence, the Trial Chamber recently characterised the CAR Documents as relevant to "its overall determination of the truth with respect to the chain of command and control of the MLC troops in the CAR during the relevant time period."[22] Any materials or documents proving or tending to prove that they are authentic contemporaneous records of the events central to the Main Case is undoubtedly also disclosable as exculpatory to the Defence.

11. If the disclosed exculpatory materials "related to Narcisse Arido" do not concern the CAR Documents, this is not fatal to the present Defence request. The Prosecution has framed its Article 70 allegations in terms of a "scheme" or "conspiracy", with Mr. Bemba at the head. The Prosecution has repeatedly alleged that Mr. Bemba "is orchestrating the scheme."[23] The arrest warrant, pursuant to which the Article 70 accused remain incarcerated, states that the case involves:

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[20] ICC-01/05-01/08-2940, para. 3.
[21] Annex B.
[22] ICC-01/05-01/08-3019-Conf, para. 50.
[23] ICC-01/05-44-Red, para. 22.

> a criminal scheme has been affording benefits and advantages to certain Defence witnesses in exchange for false testimony and the presentation of false or forged evidence in the Case... Ultimately, the Accused, who orchestrates the scheme, profits from it and it is now mainly implemented by Aimé Kilolo and Jean-Jacques Mangenda, assisted by a number of persons in the field, including Fidèle Babala, [REDACTED] and Narcisse Arido…
>
> the scheme consists of three categories of conduct, each alone justifying arrest: i) presentation and filing in the Case of false or forged documents; ii) coaching of witnesses to give false testimony before the Trial Chamber in the Case; and iii) transfers of money to several Defence witnesses in the Case.

12. Concerning Narcisse Arido, the Single Judge stated that:[24]

> there are reasonable grounds to believe that he provided false or forged evidence, which was disclosed to the Prosecutor and which the Defence attempted to tender into the record of the Case, and that he transferred sums of money to Defence witnesses. In particular, there are reasonable grounds to believe that i) he received sums of money from Bemba's close associates, including Aimé Kilolo and Fidèle Babala, around the date of delivery of the documents to Aimé Kilolo; ii) he acted as intermediary in respect of other money transfers to other witnesses [REDACTED]; and iii) he transferred money to Defence witnesses.

13. Mr. Bemba, according to the Prosecution theory, is inextricably linked to the alleged criminal activity of Mr. Arido. The Single Judge held that he was satisfied that there were reasonable grounds to believe that Mr. Bemba "heads the said criminal scheme and that from the detention centre he orchestrates the activities undertaken by his associates in respect of its implementation."[25] Given the Prosecution's position that the existence of this scheme affected the probative value and credibility of the Defence evidence in the Main Case, material or documents which disprove or tend to disprove the involvement or criminal liability of Mr. Arido accordingly also affects the overall credibility of Defence evidence, and is therefore undoubtedly disclosable. Moreover, information exculpating Mr. Arido

[24] ICC-01/05-01/13-1-Red2-tENG, para. 19.
[25] ICC-01/05-01/13-1-Red2-tENG, para. 15.

vis-à-vis the "scheme" or "conspiracy" may also have relevance to chain of custody issues, and potential arguments that the Prosecution may raise in their final trial brief or closing submissions. The Prosecution's position that "our assessment is that this material cannot be considered as exculpatory for Mr Bemba in the main case"[26] is simply untenable.

14. In light of this, and considering the Prosecution's general approach to disclosure in the present case, for which it has previously been admonished by the Chamber,[27] the Defence is concerned that there are other materials in addition to those identified in the present motion, which should also have been disclosed to Mr. Bemba in the Main Case. For the avoidance of doubt, the Defence states its position that, given that the Prosecution has placed Mr. Bemba at the head of the alleged "scheme" the subject of the Article 70 Case, and given that the Prosecution alleges that material in the Article 70 case impugns the credibility of Defence evidence in the Main Case, any exculpatory material disclosed in the Article 70 Case should also properly disclosed to the Defence. The obligation incumbent on the Prosecution is clear; the Prosecution as one organ is expected to review continuously evidence in the possession of all of its pre-trial and trial teams to determine whether any could be relevant to the case in question, and disclose as soon as practicable.[28]

[26] Annex B.
[27] [REDACTED].
[28] ICC-01/04-01/06-2471, Regulation 42 of the ICC Regulations of the Court, *Prosecutor v. Brdjanin*, IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, page 4; *Prosecutor v. Brdjanin*, IT-99-36-A, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68 bis and Motion for Adjournment While Matters Affecting Justice and a Fair Trial can be resolved", 30 October 2002, para. 29; *Prosecutor v. Bagosora* et al, ICTR-98-44-T, Decision on Interlocutory Appeals on Decision on Witness Protection Orders, 6 October 2005, para. 44; *Prosecutor v. Krštić*, IT-98-33-A, Appeal Judgment, 19 April 2004, para. 206.

15. The Defence finally recalls that the Chamber rejected the Prosecution's request to admit material related to the Article 70 Case in the present proceedings.[29] This decision concerning the admissibility of evidence has no bearing on whether the identified materials are **disclosable** in the Main Case. Nor does the expiration of the Chamber's deadline for the admission of evidence preclude disclosure of the materials to the Defence. Disclosure is necessary, at a minimum, to allow the Defence to assess whether the Prosecution's failure to disclose in a timely manner prevented the exploration of other issues and collecting and presenting relevant evidence before the close of the Defence case. The expiration of the deadline for submitting evidence cannot be used to deprive the Defence of the right to make submissions where the Prosecution's failure to disclose in a timely manner precluded further investigations or the presentation of evidence relevant to the defence of the accused.

D. REQUESTED RELIEF

16. On the basis of the submissions made above, the Defence respectfully requests that the Chamber

> **ORDER** the disclosure of any and all exculpatory materials "related to Narcisse Arido"; and

> **ORDER** that the Prosecution review all materials in its possession gathered during the Article 70 investigation and ensure compliance with its disclosure obligations in the Main Case.

The whole respectfully submitted.

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[29] ICC-01/05-01/08-3029.

Peter Haynes QC

Lead counsel for Mr. Jean-Pierre Bemba

The Hague, The Netherlands

7 April 2014