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No.: **ICC-01/05-01/08**
Date: **9 April 2014**

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 Redacted document

Public Redacted version of "Prosecution's Reply to the Defence 'Response to the Prosecution's Application to Submit Additional Evidence'", 28 January 2014, ICC-01/05-01/08-2948-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 Prosecutor ("Prosecution")'s Request[1] for an extension of time to submit critical evidence bearing on Defence witness credibility is supported by good cause, justified, and necessary for Trial Chamber III's (" Chamber") determination of the truth. The proffered evidence[2] is exceptional and admissible as evidence bearing on the credibility of Defence evidence. The Defence arguments in its "Response to the Prosecution's Application to Submit Additional Evidence" ("Defence Response" or "Response") are misplaced, hyperbolic, and inaccurately anticipate illusory issues arising out of the evidence itself rather than address the Prosecution request for an extension of time to submit the proffered evidence.

2. Contrary to the exaggerated Defence claims of "years" of delay, the admission of the proffered evidence will likely reduce the time required for the Chamber's deliberations, as it will facilitate the Chamber's weighing of the credibility and reliability of Defence evidence. In the interests of justice the Chamber should grant the Prosecution request.

II. Request for Confidentiality

3. The Prosecution files this Reply as "Confidential" as it replies to a Defence Response classified as "Confidential".[3]

III. Procedural History

4. On 30 October 2013 the Chamber ordered parties to submit any applications for

[1] ICC-01/05-01/08-2910, Prosecution's Application to Submit Additional Evidence, 29 November 2013.
[2] As explained in filing 2910 the proffered evidence includes one recording, one report, and one spreadsheet with financial information.
[3] *See* Regulation 23bis(2) of the Regulations of the Court.

the admission of any remaining material into evidence by 8 November 2013.[4]

5. On 29 November 2013 the Prosecution requested an extension of time to submit additional evidence stemming from its investigation into offences against the administration of justice.[5]

6. On 15 January 2014 the Defence objected to the Prosecution Request to submit additional evidence.[6]

7. On 20 January 2014 the Prosecution requested leave to reply to the Defence Response.[7]

8. On 22 January 2014 the Chamber granted the Prosecution's request for leave to reply to the Defence Response.[8]

IV. Submissions

a) There is a proper legal basis for the admission of the evidence

9. The Chamber has a duty to establish the truth. To exclude the proffered evidence from the Chamber's consideration, as the Defence prays, would require the Chamber to ignore the critical fact that, according to the evidence obtained in the course of the Article 70 investigation, much of the Defence evidence presented at trial was tainted. Indeed, the proffered evidence shows that the former lead Defence

[4] ICC-01/05-01/08-2855, Decision on the Motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence, 30 October 2013, para. 18.
[5] ICC-01/05-01/08-2910, Prosecution's Application to Submit Additional Evidence, 29 November 2013.
[6] ICC-01/05-01/08-2937, Response to the Prosecution's Application to Submit Additional Evidence, 15 January 2014.
[7] ICC-01/05-01/08-2940, Prosecution's Request for leave to reply to Defence ''Response to the Prosecution's Application to Submit Additional Evidence'', 20 January 2014.
[8] ICC-01/05-01/08-2942, Decision on 'Prosecution's Request for leave to reply to Defence ''Response to the Prosecution's Application to Submit Additional Evidence'', 22 January 2014.

counsel and close associates of Jean-Pierre Bemba Gombo (''Accused'') paid money to a number of Defence witnesses. The proffered evidence also shows that the former lead Defence counsel with the assistance of the former case manager had contact with Defence witnesses directly before and during their testimonies, told certain witnesses what to say during their testimonies, and informed certain witnesses of questions ahead of their testimonies. This is highly relevant evidence for the purposes of evaluating the credibility of the evidence led by the Accused, through his counsel, in this trial, and accordingly its admission is amply justified.

10. The Defence arguments inaccurately state that the Prosecution could have and should have disclosed the proffered evidence and should now be barred from submitting it in a bar table motion or in rebuttal. Much of the proffered evidence was not in the Prosecution's possession until after the Chamber's 8 November 2013 deadline to submit evidence. The proffered report and recording were released to the Prosecution by the Single Judge of Pre-Trial Chamber II on 15 November and 21 November 2013, respectively. Thus, the Prosecution could not have submitted these materials into evidence until after the Chamber's deadline of 8 November 2013. The proffered spreadsheet containing financial information had been in the Prosecution's possession for several months prior to the Chamber's 8 November 2013 deadline. However, its disclosure to the very individuals who were under investigation would have severely compromised the Prosecution's investigation into offences under Article 70 of the Rome Statute (''Statute'').[9]

11. The Prosecution seeks to submit the evidence in a bar table motion and is not requesting a rebuttal phase of the case. However, contrary to the claims of the Defence, the Prosecution has legal grounds to request alternatively that the Chamber consider the evidence as rebuttal evidence. In the *Lubanga* case Trial Chamber I recognized that though the Rome Statute "[…] does not expressly create a stage of

[9] [REDACTED].

the proceedings in which rebuttal evidence may be called, the provisions are sufficiently broadly framed to permit the Chamber to allow evidence of this kind to be introduced."[10]

12. In the *Lubanga* case Trial Chamber I suggested a legal test for rebuttal evidence: 1) the issue has arisen *ex improviso,* 2) the rebuttal evidence satisfies the admissibility criteria and, 3) the rebuttal will not undermine the Accused's rights under Article 67 of the Statute.[11] The proffered evidence meets the above test for rebuttal evidence: 1) Much of the evidence was not available for disclosure and use until after the Chamber's 8 November 2013 deadline, and could not have been disclosed while the suspects were at large and capable of making attempts to cover their actions; 2) the proffered evidence is admissible under Article 69(4) of the Statute as it is relevant and probative to the issue of the reliability and credibility of Defence evidence; 3) and, as is shown below, the Chamber's consideration of the proffered evidence under the rubric of rebuttal would not be prejudicial to the rights of the Accused as he was aware of the lack of credibility of Defence evidence.

13. Regulation 35(2) governs the Prosecution's application to submit additional evidence. The Chamber issued an 8 November 2013 deadline to submit evidence in the case thus the Prosecution must demonstrate "good cause" to submit the proffered evidence. Additionally, since the Prosecution's application comes after the expiration of the time limit, the burden is on the Prosecution to demonstrate that it could not file the application for reasons outside its control.[12] As stated above, the Prosecution was

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[10] *See* ICC-01/04-01/06-2727-Red, Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, 28 April 2011, para. 37.
[11] *Ibid.* para. 43.
[12] The Prosecution seeks a time extension from the Chamber's 8 November 2013 deadline to submit evidence in ICC-01/05-01/08-2855, Decision on the Motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence, 30 October 2013, para. 18, and not as stated in the original application from the Chamber's 1 November 2013 Decision ICC-01/05-01/08-2861, Decision on the time limit for the conclusion of the defence's presentation of oral evidence at trial, 1 November 2013. The Prosecution's incorrect identification of the relevant Decision setting out the deadline to submit evidence should not be fatal to the Prosecution's application to submit additional evidence.

not in the possession of the report and recording until after the Chamber's deadline to submit evidence and accordingly these items could not have been submitted earlier. And though the Prosecution possessed the spreadsheet containing financial information, as this was intrinsically linked to the overall Article 70 investigation and the unpredictable actions of suspects, disclosure to the Defence and submission to the Chamber was not an available realistic option until the Prosecution had collected additional evidence and was ready to move forward with a case. To proceed otherwise would have made the investigation nearly impossible. Should the Chamber find that the submission of the financial spreadsheet was within the Prosecution's control in spite of the Prosecution's inability to control the action of suspects, the Prosecution requests in the alternative that the Chamber order the submission of the evidence under Article 69(3) of the Statute, as such evidence is undoubtedly "necessary for the detention of the truth".

b) Admission will not cause any prejudice to the integrity or efficiency of the trial

14. The Defence presents a parade of horribles were the Chamber to grant the Prosecution application to submit additional evidence. Though the Defence claims are not relevant to the Prosecution's request for an extension of time, it is worthwhile to address these claims directly.

15. First, the Prosecution stresses that all of the proffered evidence was collected under the supervision of multiple judicial authorities, which created safeguards to protect the integrity and legality of the collection of evidence. The Single Judge of the Pre-Trial Chamber II and a Dutch Investigating Judge supervised an independent counsel during the collection of intercepted phone calls. This process ensured that the Prosecution could not acquire any knowledge or possession of collateral privileged communications or materials. The proffered report and recording come from this process of evidence collection. Similarly, a national judicial authority authorised the

Prosecution's collection of the financial information. The Prosecution and the Single Judge deliberately emplaced multiple legal safeguards in the investigation to ensure the integrity of the instant proceedings and of the investigation itself. The Prosecution did not request or receive any privileged communications during the course of the investigation. The phone interception itself was predicated on supporting evidence, which provided the necessary grounds of suspicion for the Single Judge and Dutch authorities to lawfully approve the investigation method. The evidence resulting from the interception is contained in the proffered report and recording.

16. Contrary to the hyperbolic Defence's assertions of years of delay, the admission of the Prosecution's evidence would ultimately save time.[13] The evidence has the potential to shorten the Chamber's deliberations, as it would facilitate the Chamber's weighing of the credibility and reliability of Defence evidence. Were to Chamber to reject the admission of the Prosecution's evidence of witness tampering it would enter deliberations having to ignore critical facts that bear significantly on the credibility and reliability of the Defence evidence. The weighing of these issues without the benefit of considering the witness tampering in this case would unnecessarily prolong the deliberations of the Chamber.

17. The Accused would not be prejudiced by the Prosecution's submission of the proffered evidence. No accused has a right to proffer false evidence in criminal proceedings before the Court. Nor can there be a derivative legitimate expectation that the credibility of such evidence will not be challenged by the Prosecution. In this sense, the Prosecution stresses that the purpose of this submission is not to be a comment on the guilt or innocence of the Accused for offences against the administration of justice, but rather to provide the Trial Chamber with the essential

[13] Though the unlikely prospect of delays in the proceedings should not impact the Chamber's ruling on whether the Prosecution has met its burden under Regulation 35(2), the Prosecution wishes to address the issue since the Defence Response contained assertions of long delays.

tools that are necessary for a full evaluation of the evidence.

18. It is clear from its Response that the Defence would prefer the Chamber did not consider the proffered evidence as it contains clear and compelling facts that are unhelpful to its case. The Defence will likely file several arguments to preclude the Chamber's consideration of the evidence, but the law and the Chamber will ultimately decide on Defence attempts to challenge the evidence.

V. Relief Sought

19. The Prosecution reiterates its request that the Chamber grant the Prosecution an extension of time to submit additional evidence.

20. Alternatively, the Prosecution respectfully requests the Chamber to order the submission of the additional evidence for the determination of the truth under Article 69(3) of the Statute.

Fatou Bensouda, Prosecutor

Dated this 9th Day of April 2014

At The Hague, the Netherlands