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No.: ICC-01/05-01/08

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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

**Public Redacted Version of Defence Response to the Prosecution's Request for
Extension of Time pursuant to Regulation 35(2) of the Regulations of the Court**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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1. The heavy irony of the Prosecution application herein is impossible to ignore. On the same day that it accused Defence counsel of [REDACTED],¹ the Prosecution has filed a request for an extension of time to respond to Defence filings concerning the Article 70 investigation and proceedings.²

2. The Defence cannot fail to note that, in terms of actions designed or likely to “disrupt the current proceedings” and/or militate against “their efficient and expeditious completion”, the Prosecution has, by rote:

(a) systematically and tactically failed to put its case to Defence witnesses during the course of their evidence in favour of conducting a furtive investigation, the fruits of which it would seek to introduce after the close of all the evidence in the case;

(b) embarked upon an investigation which struck at the heart of the privileged communications between the accused and his lawyers;

(c) commenced an ill-conceived investigation in the wrong forum and persisted in that vein for 5 months;

(d) caused the arrest of Lead Counsel for the Defence, and the Defence Case Manager, with all the concomitant disruption to the progress of the case that inevitably entailed;

(e) sat silent in court, when on 28 November 2013, the Defence indicated it would use its best endeavours to comply with the existing timelines for the case’s completion, rather than indicate it would seek to introduce fresh evidence, resorting instead to an untelegraphed written filing subsequently;

¹ [REDACTED].

² ICC-01/05-01/08-3040.

(f) failed to comply with the time limits for disclosure in the Article 70 case, requesting a 4 month extension in relation to 5 men whom it had caused to be held in detention;

(g) even after it had been granted a 2 month extension to fulfill its disclosure obligations, sought to introduce a massive new tranche of evidence into the case, to whit the email records of the former members of the Defence team;

(h) dealt with the Defence's reasonable requests for disclosure arising out of the Article 70 investigation either by simply refusing to reply, or by obfuscation, evasion and self-contradiction, promulgating unnecessary litigation before the Trial Chamber; and

(i) submitted this application.

3. Notwithstanding the fact that the current state of the case is entirely of the Prosecution's making, and notwithstanding either the Prosecution's abundant resources, the Defence takes no position on the Prosecution's request.

4. However, the Defence is compelled to notify the Trial Chamber, as a matter of courtesy, that the Defence request of 9 April 2014 to which the Prosecution refers,³ is far from the last major procedural submission that the Defence anticipates filing.

5. The Prosecution caused Mr. Bemba's former Defence Lead Counsel and Case Manager to be arrested in November 2013. Since almost the moment of their arrest,

³ ICC-01/05-01/08-3036 + Anxs, Defence urgent request for disclosure and injunctive relief concerning privileged Defence communications, 9 April 2014.

the Defence has received, often on a daily basis, information and materials which raise real and significant concerns regarding the impact of the Article 70 investigation on the main case. The Defence is continuing to receive information and materials, much of which, in the Defence submission, should have been provided or disclosed by the Prosecution at a much earlier stage.

6. Moreover, until at least the end of May, as a result of the extension in the timetable for disclosure in the Article 70 case - which the Prosecution itself requested and was granted - the Defence anticipates more and more material and information becoming available that will be directly relevant to the conduct of the current proceedings. The Defence only learnt on 3 April 2014, for example, that the Prosecution had in its possession DVDs containing the contents of the email accounts of the former Lead Counsel and former Case Manager,⁴ which undoubtedly contain a wealth of material which is privileged in the present proceedings. The Defence was duty bound to react.

7. Moreover, the Defence does not read the Trial Chamber's "Decision on the 'Prosecution's Application for the Submission of Additional Evidence'"⁵ as definitively blocking the admission of materials from the Article 70 proceedings in the main case. In fact, the Chamber is explicit in finding that "it would be premature" to admit the Article 70 materials in the present proceedings before findings are made by the Pre-Trial Chamber.⁶ The door has not been shut. In fact, it appears expressly to have been left open.

8. As such, there are real and objective challenges to moving forward with the Closing Brief phase before the matters concerning the Article 70 investigations and their impact on the main case are resolved. Otherwise, the Defence, for example,

⁴ ICC-01/05-01/13-310-Red.

⁵ ICC-01/05-01/08-3029.

⁶ ICC-01/05-01/08-3029, para. 31.

would be writing its Closing Brief at a time that the Prosecution is seeking and even gaining access to email accounts which themselves contain drafts of the Defence Closing Brief. This is the reality that has been created.

9. It is, moreover, wholly inappropriate for the Prosecution to attempt to hit pause on compliance with disclosure obligations to concentrate on what it openly characterises as its priority, its Closing Brief. This belies a fundamental misunderstanding on the part of the Prosecution as to the disclosure obligations incumbent upon it. As Her Honour Judge Steiner held in the *Katanga* case, “investigative powers are concomitant with investigative duties”,⁷ and the Prosecution’s obligation to disclose exculpatory material has been considered as important as the obligation to prosecute.⁸ The Appeals Chamber has been explicit that issues of Prosecutorial resources are an irrelevant consideration to the fulfillment of its disclosure obligations.⁹

10. The Prosecution’s attempt to characterise the Defence filings and letters as an irritating distraction from its number one priority of finalising its Closing Brief ignores this reality: had the Prosecution been complying with its disclosure obligations, the majority of these letters and filings would not have been necessary. Instead, the Defence has been forced to expend its – significantly smaller – pool of resources drawing these failings to the attention of the Prosecution and/or the Chamber and attempting to prompt the Prosecution to act like the minister of justice it is supposed to be. To that end, the Defence notes the Appeals Chamber’s explicit ruling that “the Prosecutor has an obligation to disclose information that is material to the preparation of the defence pursuant to rule 77 independently of any request from the defence.”¹⁰

⁷ ICC-01/04-01/07-621, para. 39.

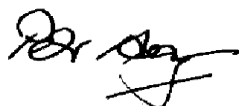
⁸ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Decision on Motions to Extend Time For Filing Appellant’s Briefs, para. 14.

⁹ ICC-02/05-03/09-501, para. 37.

¹⁰ ICC-02/05-03/09-501, para. 34.

11. It should not be overlooked that the filings and letters for which the Prosecution now seeks an extension of time to respond have been prompted, in the large part, by a wholesale and consistent failure of the Prosecution to comply with its statutory obligations in the main case. Moreover, the Defence's attempts to have these matters dealt with expeditiously and *inter partes* have been consistently met with the Prosecution's standard response that the Defence should instead embark on litigation before the Trial Chamber, the very litigation for which it now seeks an extension of time to respond.¹¹

12. The whole respectfully submitted.



Peter Haynes QC

Counsel for Mr. Jean-Pierre Bemba

14 April 2014

¹¹ Response from Mr. Jean-Jacques Badibanga to the Letter from the Defence dated 16 January 2014, 21 January 2014: "As indicated, if you have the intention to pursue any discussions pertaining to the art 70 case, **we would appreciate that you doing so via formal request to the TCIII or the PTCII**"; Response from Mr. Jean-Jacques Badibanga to the Letter from the Defence dated 25 February 2014, 3 March 2014: "I understood that you filed a motion addressing contact with Defence witnesses to which we responded. The Trial Chamber is still to rule on it. If you have additional requests related to the same matter, **I invite you to address the Trial Chamber III via a formal filing to which we will respond**"; Response of Mr. Jean-Jacques Badibanga to the Letter from the Defence dated 6 March 2014, 10 March 2014: "The Office of the Prosecutor has assisted to the extent possible in responding to your series of letters sent since January 2014. If you would like to pursue these matters further, **we suggest that you make an official request through the Chamber with justification, to which we will respond**"; Response of Mr. Jean-Jacques Badibanga to the Letter from the Defence dated 7 April 2014, 9 April 2014: "Further, any concerns you may have about the Anonymous Informant's knowledge of the identity or travel of any defence witness is, for the purposes of your investigation, **best brought to the Chamber's attention.**"