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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**

Confidential

Defence Request for Leave to Reply to the "Consolidated Response to the Defence Requests"

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**

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A. INTRODUCTION

1. On 20 March 2014, the Defence submitted a 'Request for Disclosure', in which the Defence requested the Prosecution to disclose specific categories of information, which were germane to the protection, credibility and future availability of Defence witnesses.¹
2. On 7 April 2014, the Defence submitted a further request for the Prosecution to disclose any exculpatory information or evidence arising from the Article 70 proceedings.²
3. The Defence was compelled to file the requests of 20 March and 7 April 2014 ("the Defence Requests") due to the Prosecution's failure to fulfill its duty to disclose, *proprio motu*, exculpatory information, and Rule 77 information concerning the credibility of Defence witnesses.
4. Rather than responding to the Defence's targeted and justified disclosure requests in a timely manner, the Prosecution hid behind the Article 70 proceedings in order to play the litigation equivalent of divide and rule – repeatedly citing the mere existence of the proceedings – as a justification for refusing to disclose information, which clearly concerns the Main Case.
5. The Defence was thus forced to litigate this issue before the Chamber due to the Prosecutor's time and resource consuming practice of stonewalling the Defence.³

¹ ICC-01/05-01/08-3020-Conf.

² ICC-01/05-01/08-3033-Red.

³ 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.**"

6. In its Consolidated Response to the Defence Requests,⁴ the Prosecution maintained its intransigence by once again, hiding behind the existence of Article 70 proceedings as a pretext for refusing to engage in issues, which clearly concern the rights of Mr. Bemba in the Main Case.

7. The Prosecution has also compounded the prejudice to the Defence by using the very same materials, which it refuses to disclose to the Defence, as the basis for impugning the professional standing and ethics of the current Counsel for Mr. Bemba in the Main Case.

B. SUBMISSIONS

8. The Defence for Mr. Bemba's respectfully seeks the leave of the Trial Chamber to file a focused reply, firstly, in relation to the overarching issue as to whether it is acceptable for the Prosecution to use the existence of Article 70 proceedings to create 'a vicious circle', according to which the Prosecution can:

firstly, coopt Defence evidence and information from the Main Case at will in order to trigger an Article 70 investigation;

secondly, exploit the Article 70 investigation as a mechanism to obtain information concerning Defence strategy (including information provided directly to the Defence from Mr. Bemba) or covered by ex parte protective measures, which the Prosecution wouldn't otherwise have been entitled to receive;

thirdly, use the existence of Article 70 proceedings to impugn the credibility of the Defence, and the Defence evidence in the Main Case; and

fourthly, use the fact that the evidence and information has now been used in the Article 70 case to deprive the Defence of any ability to defend themselves against such allegations, to be apprised as to the factual basis for such

⁴ ICC-01/05-01/08-3039-Conf.

prejudicial allegations, or to receive information that would otherwise be disclosable in the Main Case.

9. There is good cause for the Defence to be accorded an opportunity to address the disingenuous nature of the Prosecution's attempt to avoid disclosure obligations by labeling Defence witnesses in the Main Case as 'Article 70 witnesses'.

10. There is no property in a witness, but the information concerning a particular witness is, and will always be, *prima facie* relevant to the party which called the witness. Given the nature and scope of the Article 70 allegations, the Defence witnesses were evidently questioned in relation to the Defence team, Defence evidence in the Main Case, and potentially, Defence strategy and communications in the Main Case. The information is thus relevant to the Main Case.

11. Hiding the witnesses under the umbrella of the Prosecution's Article 70 investigations does not lessen their relevance to the Main Case.

12. The Prosecution approach, demonstrated clearly in its Consolidated Response, is predicated on a complete misapprehension of its duties of disclosure, in particular, as concerns its construction of its duties under Rule 77, and more than that, a cynical exploitation of the protective measures in two concurrent sets of proceedings. There is thus good cause for the Defence to be accorded with an opportunity to clarify why this information is material to the preparation of the Defence in the Main Case.

13. Secondly, the Defence is compelled to respond to the suggestion made by the Prosecution that:⁵

there is an apparent risk of a conflict of interests affecting current leading counsel and co-counsel stemming from the Article 70 inquiry, inter alia due to the fact that they were both members of the Defence team when the Article 70 offences were committed and accordingly may be called as witnesses in the Article 70 case. This means that absent compelling reasons, the fair and efficient conduct of this case

⁵ ICC-01/05-01/08-3039-Conf, para. 15.

actually strongly militates against this Defence team having access to the evidence obtained and disclosed in the Article 70 inquiry. And there is no such compelling reason. Rather, the Defence is inexplicably insisting in obtaining material that does not relate to the facts and circumstances of this case and in so doing, is disrupting the current proceedings and conspiring against their efficient and expeditious completion.

14. There is no material before the Defence, which would suggest that Counsels are conflicted from continuing their representation of Mr. Bemba. If Prosecution possessed such information, then as it is clearly central to the rights of Mr. Bemba, it should have been disclosed immediately so that Mr. Bemba and his Defence can make an informed decision as to the existence of such a conflict. The Prosecution is not allowed to advance tendentious assertions and allegations, which they are not prepared to substantiate.

15. The Defence should be accorded a right to reply to such allegations, which strike at the heart of the manner in which the Prosecution has approached this case, and its duties to the Defence.

16. If the Prosecutor sincerely adhered to such a belief, then her duty as a Minister of Justice would have impelled her to call for Counsel to withdraw. At the very least, the Prosecution should have put the matter to the Chamber to adjudicate. The fact that the Prosecution has, instead, cited this as a flimsy pretext for failing to engage in the disclosure process speaks volumes concerning the genuineness of this argument.

17. The Prosecution's submissions thus go beyond the mere expression of legal arguments and venture into areas of straightforward personal and professional offensiveness, and ought to be deprecated by the Chamber. They have no place made in a filing by the Prosecutor of the International Criminal Court, and the Defence respectfully submits that it should be afforded the opportunity to reply.

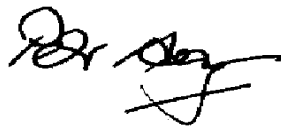
C. RELIEF

18. For the reasons set out above, the Defence for Mr. Jean Pierre Bemba-Gombo respectfully requests the Honourable Trial Chamber to:

AUTHORISE the Defence to file a reply to the two issues identified above in the Prosecution Consolidated Response; and

GRANT the Defence Requests

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel for Mr. Jean-Pierre Bemba Gombo

The Hague, The Netherlands

15 April 2014