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Date: 25/04/2014

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

**Public Redacted Version of Defence Reply to Prosecution's response on Defence
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:

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**Victims Participation and Reparations Other
Section**

A. INTRODUCTION

1. Pursuant to the Trial Chamber's order of 17 April 2014,¹ the Defence for Mr. Bemba hereby files its reply in relation to:

- i. the scope of the Prosecutor's duty to disclose Article 67(2) and Rule 77 materials at this stage of the proceedings; and
- ii. the propriety of the Prosecutor's submissions concerning Counsel.

B. SUBMISSIONS

i) Information concerning Requests for Assistance (RFA) and Defence witnesses fall squarely within the Prosecutor's disclosure obligations, irrespective of the stage of the proceedings

2. The Prosecution is subject to a continuous obligation to disclose Articles 67(2) and Rule 77 materials throughout the proceedings.

3. The Prosecution has further accepted that firstly, its ability to conduct further investigations during the Defence case was contingent on its fulfillment of its duty to disclose any Article 67(2) and Rule 77 materials collected during such investigations "as soon as practicable" even if the relevance was not immediately discernable,² and secondly, the notion of what falls under Article 67(2) and Rule 77 must be understood in a broad and fluid sense, in order to take into consideration evolving case theories.³ It would be inimical to the Prosecutor's duties as an impartial Minister of Justice if the Prosecution were allowed to perform a *volte face* on these issues.

4. Since the Defence could, conceivably, tender additional evidence on appeal or in connection with sentencing (if bifurcated) or reparations, the fact that the evidential phase of the trial has closed does not relieve the Prosecutor of its disclosure duties.

¹ ICC-01/05-01/08-3049.

² ICC-01/05-01/08-2283, para. 5.

³ ICC-01/05-01/08-2283, paras. 16- 17.

5. Similarly, the obligation to disclose as soon as practicable mandates that the Prosecution cannot and should not wait to disclose any information which could fall within the parameters of Article 67(2) or Rule 77. It is not the role of the Prosecutor to second-guess whether the Chamber will allow the Defence to use this evidence at this stage: admissibility is not a precondition for disclosure.

6. The Prosecutor has never previously contested the disclosability of information concerning Requests for Assistance directed to States (RFAs).⁴ The Prosecution has provided absolutely no justification for its refusal to disclose in the present case, nor is it in a position to do so.

7. Matters, which are material to the preparation of the Defence are not limited to those pieces of evidence which might contradict, explain or mitigate evidence presented by the Prosecution. They extend, *inter alia*, to novel matters tending to support the credibility of Defence evidence already called, and material tending to show impropriety, *mala fides* or even illegality on the part of the Prosecution.

8. [REDACTED].⁵

9. The putative role of the DRC in any investigations conducted by the Prosecution into the credibility of Defence evidence and Defence witnesses is material to potential Defence submissions concerning the security and protection of Defence witnesses (which could be relevant in the event of a separate sentencing phase or appeals stage), and the credibility and probative value of any leads or information proffered by the DRC, which are being used by the Prosecution to impugn the Defence case.

ii) *Interviews of Defence witnesses conducted by the Prosecution are plainly disclosable as well as being prima facie admissible as evidence*

⁴ Email from Mr. Jean-Jacques Badibanga to the Defence, 21 February 2014 18:31.

⁵ [REDACTED].

10. In terms of the information concerning Defence witnesses, the Prosecution explicitly recognised in 2012 that information concerning Defence witnesses was disclosable under Rule 77.⁶ It is, therefore, disingenuous for the Prosecution to attempt to avoid its disclosure obligations by labeling Defence witnesses in the Main Case as ‘Article 70 witnesses’.

11. 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.

12. 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.

13. Hiding the witnesses under the umbrella of the Prosecution’s Article 70 investigations does not lessen their relevance to the Main Case. To the contrary, the relevance of the Arido materials is blindingly obvious. He is the alleged creator of the 14 supposedly forged documents. Evidence tending to show they are genuine (including, for example, his interview) must be admissible to counter the evidence, already admitted of, for example, Witness CHM-01.

14. Similarly, if Defence witnesses confirmed their testimony during interviews with the Prosecution, such statements would confirm the credibility of the witnesses in the same manner as a prior consistent statement. Indeed, it is arguable that a subsequent consistent statement, which was taken by the Prosecution as opposed to the Defence, has greater weight than a prior consistent statement, which was recorded by the same party, which later called the witness to testify.

⁶ ICC-01/05-01/08-2283.

15. Since the Prosecution has repeatedly sought to benefit from the Trial Chamber's willingness to admit consistent written statements through Rule 68, it would be highly unfair for the Prosecution to withhold information or evidence, which could allow the Defence to move the Chamber to adopt the same approach as concerns these witnesses.

16. Again, since evidence does not need to be admissible to be disclosable, the close of evidence does not exempt the Prosecution from its duty to disclose such statements.

17. Immediate disclosure *via* the Prosecution is also required to enable the Defence to verify whether the Prosecution had such statements in its possession before the close of evidence, but failed to disclose them. If that were to be the case, the Prosecutor's failure to disclose such statements in a timely manner will have deprived the Defence of the ability to submit relevant and probative evidence before the expiration of the deadline. The Prosecution cannot be permitted to benefit from the fruits of its failure to perform its disclosure obligations in a timely manner, by relying on the expiration of the evidential deadline as a ground for refusing to effect disclosure at the present juncture, which in turn, deprives the Defence of the ability to seek any remedy for the initial non-disclosure.

iii) The central premise of the Prosecution Response, namely, that the Chamber has refused to admit the "Article 70 evidence", is incorrect

18. Moreover, even if the Trial Chamber has not admitted evidence from the Article 70 investigations at this juncture, it has not excluded the possibility that it could do so at some point in the future. The obligation to disclose information "as soon as practicable" mandates that the Defence should have the right to receive all relevant information now so that it can adjust its strategy and focus in its final brief in order to address such a possibility; the Prosecution do not, however, have the right to sit on this material for the purpose of ambushing the Defence at a later stage.

iv) The propriety of the Prosecution's submissions concerning Defence Counsel

19. The Prosecution has provided no material to the Defence, which would suggest that Counsel are conflicted from continuing their representation of Mr. Bemba. The Prosecution is not allowed to advance tendentious assertions and allegations, which they are not prepared to substantiate.⁷

20. In resorting to allegations concerning a risk of a conflict of interest, the Prosecution is arguing that disclosure could be different depending on the identity of counsel. This is completely offensive.

21. If that submission is maintained and/or upheld, then Counsel for Mr. Bemba would be forced to withdraw forthwith because the Prosecution are alleging that Counsels' personal presence in the case affects their client's right to proper disclosure. The Prosecution should not, however, be permitted to generate such a conflict between the Defence and the interests of Mr. Bemba, which is clearly to the detriment of Mr. Bemba's right freely to choose Counsel and his right to effective representation, in the absence of any objective justification for doing so.

22. In this regard, 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 authenticity of this argument.

23. It is also pertinent that the Single Judge in the Article 70 case, who has accessed more information than the Prosecution, appears to be of the position that there is no impediment as concerns the appropriateness of Defence Counsel in this case accessing all the Article 70 materials.⁸

⁷ ICC-01/04-01/06-2433, paras. 39 and 50; ICC-01/04-01/06-2434-Red2, at paras. 16 and 135; ICC-01/09-02/11-83, paras. 8-9.

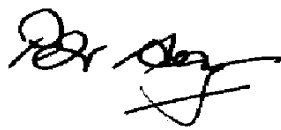
⁸ ICC-01/05-01/13-347-Red.

C. RELIEF SOUGHT

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

GRANT the Defence Requests.

The whole respectfully submitted.

A handwritten signature in black ink, appearing to read 'Peter Haynes', with a stylized flourish at the end.

Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

25 April 2014