

**Cour
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**International
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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

**Prosecution Response in Opposition to “Defence Motion for Admission of
Materials pursuant to Article 64(9) of the Rome Statute”**

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 the Prosecutor ("Prosecution") opposes the "*Defence Motion for Admission of Materials pursuant to Article 64(9) of the Rome Statute*"¹ ("Motion"). The Trial Chamber III ("Chamber") should reject the Motion since the Defence provides no justification under Regulation 35(2) of the Regulations of the Court ("Regulations") for filing the Motion after the expiration of Chamber's 8 November 2013 time limit to submit documentary evidence.

2. The Defence explanation that the submission of evidence should be received pursuant to the Chamber's decision of 30 October 2013 granting the Defence an opportunity to submit a substantiated motion after 8 November 2013, ignores that the Chamber also ruled, in the same sentence, that such a motion ought to be submitted "*before the Chamber declares the submission of evidence to be closed*" (emphasis added),² an event that occurred on 7 April 2014.³

3. The media articles submitted are clearly not "new" evidence. The Defence complaints that the Prosecution violated its statutory duty to disclose Article 67(2) material are plainly wrong and have been made without a minimal due diligence inquiry into disclosed evidence: of the 11 purported newly-discovered media articles submitted, the Prosecution disclosed two in October 2008,⁴ nine are substantially

¹ ICC-01/05-01/08-3045-Conf, Defence Motion for Admission of Materials pursuant to Article 64(9) of the Rome Statute, 16 April 2014.

² ICC-01/05-01/08-2855, Decision on the Motion for clarification and reconsideration of the timetable for the parties' final submission of evidence, 30 October 2013, para. 13.

³ ICC-01/05-01/08-3035, Decision on closure of evidence and other procedural matters, 7 April 2014.

⁴ See CAR-OTP-0010-0346 (newly discovered by the Defence at CAR-D04-0004-0379) and CAR-OTP-0064-0276 (newly discovered by the Defence at CAR-D04-0004-0380).

similar to other media articles disclosed to the Defence in October 2008,⁵ and one of the previous disclosed articles is already in evidence.⁶

II. Request for Confidentiality

4. Pursuant to Regulation 23(2)*bis* of the Regulations the Prosecution files this response as “Confidential”, as it refers to the Defence Motion of the same classification.

III. Procedural History

5. In October 2008 the Prosecution disclosed to the Defence a number of media articles and recordings including CAR-OTP-0013-0106 and CAR-OTP-0064-0276, articles the Defence submitted as CAR-D04-0004-0379 and CAR-D04-0004-0380, respectively.⁷ In total, the Prosecution has disclosed more than 100 items of exculpatory evidence and more than 4300 items material to the preparation of the Defence under Rule 77 of the Rules of Procedure and Evidence (“Rules”).

6. On 30 October 2013, the Chamber set 8 November 2013 as the deadline for the final submission of evidence pursuant to Article 64(9)(a) of the Rome Statute (“Statute”)⁸.

⁵ See *e.g.* CAR-OTP-0005-0194 (admitted), CAR-OTP-0005-0139, CAR-OTP-0013-0151, CAR-OTP-0031-0122 (admitted), CAR-OTP-0013-0161 at 0163 and 0164 (admitted), CAR-OTP-0056-0312, CAR-OTP-0056-0420, CAR-OTP-0057-0243 at 0245 (admitted), CAR-OTP-0057-0349 at 0351, CAR-OTP-0010-0347, CAR-OTP-0031-0099 (admitted), CAR-OTP-0031-0122 (admitted).

⁶ See CAR-OTP-0013-0106 at 0108 (newly discovered by the Defence at CAR-D04-0004-0379).

⁷ See *e.g.* CAR-OTP-0005-0194 (admitted), CAR-OTP-0005-0139, CAR-OTP-0013-0151, CAR-OTP-0031-0122 (admitted), CAR-OTP-0013-0161 at 0163 and 0164 (admitted), CAR-OTP-0056-0312, CAR-OTP-0056-0420, CAR-OTP-0057-0243 at 0245 (admitted), CAR-OTP-0057-0349 at 0351, CAR-OTP-0010-0347, CAR-OTP-0031-0099 (admitted), CAR-OTP-0031-0122 (admitted).

⁸ ICC-01/05-01/08-2855, para. 10.

7. On 7 April 2014, the Chamber formally closed the submission of evidence pursuant to Rule 141(1) of the Rules.⁹

8. On 16 April 2014, more than five months after the expiration of the Chamber's deadline to submit evidence, the Defence sought the admission of 11 media articles.

IV. Submissions

9. The Chamber should reject the Defence Motion since the time to submit documentary evidence lapsed more than five months ago on 8 November 2013 and the Defence provides no justification for its late evidence submission. The Chamber's 30 October 2013 decision to allow the Defence additional time to submit a substantiated motion ended on 7 April 2014 when the Chamber formally closed the submission of evidence.¹⁰

10. As the Chamber summarised in its recent decision rejecting a Prosecution submission of evidence,¹¹ Regulation 35(2) of the Regulations provides that "[a]fter the lapse of a time limit, an extension may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control". The proponent of the evidence must show "exceptional circumstances" as to the reasons the evidence submission was late.¹²

11. Regulation 35(2) of the Regulations squarely applies to the issue at stake, and yet the Defence fails to provide any claim or any cognizable justification of

⁹ ICC-01/05-01/08-3035.

¹⁰ ICC-01/05-01/08-2855, para. 13 and ICC-01/05-01/08-3035.

¹¹ ICC-01/05-01/08-3029, Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, paras. 17 and 18.

¹² ICC-01/04-01/06-834, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007, 21 February 2007, paras. 9 and 10.

exceptional circumstances as required by Regulation 35(2) of the Regulations. Actually, the Defence does not address or even mention Regulation 35(2) of the Regulations at all in its Motion. The Defence argues generally that it should have the last opportunity to submit evidence once it knows the entire case against the Accused. This argument must fail since the Defence cannot cite to a single piece of evidence that was admitted in the Chamber's 7 April 2014 admissibility decision that the proffered media articles relate to, address, or rebut. In other words, nothing was admitted on 7 April 2014 that surprised the Defence and caused it, by necessity, to realise at this late stage that it was necessary to submit media articles on CEMAC and conferences attended by then-President Patassé. Considering the fact that substantially similar evidence (and in two instances, the same evidence) was in the possession of the Defence since 2008, the submission of such material could have happened months or even years ago.

12. The Defence cannot plausibly claim that it did not understand until the Chamber's 7 April 2014 decision that the Chamber might find media articles admissible under Article 69(4) of the Statute. Nor can the Defence reasonably argue that its disagreement with the Chamber's admissibility decisions provides any legal justification to first refrain from submitting evidence and then do so belatedly after the closure of the evidentiary phase has been decided. The Chamber has admitted several media articles since its first decision on the admissibility of evidence and there has been ample opportunity for the Defence to submit its evidence. Similarly, the fact that the Defence no longer disagrees with the Chamber's admission of media articles does not create a legal basis for the Defence submission of evidence.

13. Aside from the Defence's failure to meet the requirements of Regulation 35(2) of the Regulations, the proffered evidence should not be admitted.¹³ Article 64(9)(a) of the Statute empowers the Chamber to rule on the admissibility of evidence. And

¹³ With the exception of the already-admitted CAR-OTP-0013-0106.

Article 69(4) of the Statute empowers the Chamber to take in account, *inter alia*, the probative value of the evidence and the prejudice caused by its admission. The “*inter alia*” clause in Article 69(4) of the Statute provides the Chamber with a broad basis to reject otherwise admissible evidence on grounds that the admission of such evidence may cause undue delay to the proceedings, may confuse or conflate issues, or may be cumulative of other admitted evidence. Here, the proffered media articles are at best of marginal relevance; in addition, such relevance is substantially outweighed by factors such as the potential for undue delay and the prejudice that admission could have on the length and efficiency of the proceedings. Parties cannot be allowed to submit evidence in perpetuity. The interests of justice require that proceedings have finality.

14. The Defence can hardly argue that the proffered media articles are crucial evidence. The information contained in the documents has been in the possession of the Defence for over five and a half years, without the Defence ever taking any steps to adduce them at trial. This indicates that the Defence itself never considered this material to be of relevance to its case prior to 7 April 2014. In addition, with the exception of CAR-D04-0004-0379, which is already admitted as CAR-OTP-0013-0106 at 0108, the media articles are of marginal evidential value as they do not contain crucial information that bear on material issues of dispute in the case.

15. Contrary to the Defence assertions, there is no legal requirement that the Chamber “balance” the submission of evidence so that for every piece of incriminating evidence it must accept a piece of exonerating evidence. Such a legal rule would be unworkable and illogical. In any case, much of the information contained in the Defence proffered media articles is already in evidence.¹⁴

¹⁴ See e.g. CAR-OTP-0005-0194, CAR-OTP-0031-0122, CAR-OTP-0013-0161 at 0163 and 0164, CAR-OTP-0057-0243 at 0245, CAR-OTP-0031-0099, and CAR-OTP-0031-0122.

16. The Defence is only able to characterise the media articles as Article 67(2) material after travelling through several layers of factual interpretation. Without the Defence interpretation, a plain reading of the words used in the media reports do not suggest the innocence of the Accused, mitigate his guilt, or affect the credibility of Prosecution evidence. The manner in which the Defence chooses to interpret and argue the words found on the pages of its proffered evidence is best left to it, but a reasonable reading of the articles does not suggest that they contain actual Article 67(2) material. The IRIN article from 13 March 2003 at ERN CAR-D04-0004-0369 provides a good example. The article itself does not state or even suggest that former President Patassé and not the Accused had effective authority and control over the MLC (*"Mouvement de Libération du Congo"*). Apparently, the Defence seeks the admission of this document to bolster its own witnesses' credibility, since it states that the document is "manifestly relevant to the Chamber's assessment of witnesses who place President Patassé at the ultimate head of the chain of command within which the MLC fell...". However, the Defence interpretation of the article does not objectively make the document Article 67(2) material or render it otherwise admissible.

17. The Prosecution notes the misrepresentations exhibited by the Defence in its Motion.¹⁵ The Defence's strident assertion that the Prosecution has violated its statutory duties, having failed to conduct even the most cursory search of the evidence disclosed by the Prosecution, and indeed already admitted in this case is puzzling. Given the Defence's present characterisation of the evidence it now seeks to introduce, it is startling that the Defence has failed to detect this same information in

¹⁵ The Prosecution also notes the Defence misleading choice of words. In its Motion the Defence asserts in footnote 16 that the Prosecution "refused to accept service [of its disclosure of media articles]". This statement is simply false. On the day the Defence Motion was filed the Prosecution received an email from the Defence notifying the pending disclosure of evidence. The Prosecution inquired about the content and nature of the disclosure considering the 7 April 2014 Decision to close the presentation of evidence. The Defence refused to tell the Prosecution the content and nature of the disclosure. The Defence then filed its Motion wherein the Prosecution received the documents the Defence intended to disclose. The Prosecution would much rather spare the Chamber of petty details of office emails but the Prosecution is concerned about misleading information provided by the Defence in this case and is compelled to make a record of it.

the material disclosed years ago, and indeed found in the record of the case. Baseless and unsupported accusations of this kind against the Prosecution are detrimental to the expeditious conclusion of these proceedings and should be recognised as such by the Chamber.

V. Relief Requested

18. The Prosecution respectfully requests that the Chamber deny the Defence Motion.



Fatou Bensouda, Prosecutor

Dated this 29th Day of April 2014

At The Hague, the Netherlands