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Date: 21/07/2015

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

Defence Request for Leave to Reply to the Prosecution's Response to 'Defence request for a stay of proceedings and request for further 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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A. INTRODUCTION

1. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence seeks leave of Trial Chamber III ('the Chamber') to reply to the Prosecution's Response to 'Defence request for a stay of proceedings and request for further disclosure' ('Prosecution Response').¹ The Defence submits that a limited reply will assist the Chamber in its determination of the Defence request.

B. CONFIDENTIALITY

2. The 'Defence request for a stay of proceedings and request for further disclosure' ('Defence Request')² was filed simultaneously in both confidential and public redacted form. The Prosecution Response was filed confidentially on 13 July 2015, with a public redacted version being circulated on 20 July 2015. The Defence submits that nothing in the present document justifies a confidential classification, and files the document publicly.

C. SUBMISSIONS

3. The Defence Request, filed on 19 June 2015, demonstrated that the Prosecution has breached its disclosure obligations by failing to disclose investigators' reports created in 2012, which concerned the credibility of Defence witnesses ('the Material').³ The Defence seized the Chamber with a request to:⁴

ORDER the Prosecution to review its archives and disclose all material which is material to the preparation of the defence, including but not limited to that material generated during the course of its investigations into the credibility of Defence witnesses; and

¹ ICC-01/05-01/08-3265-Conf.

² ICC-01/05-01/08-3257-Red.

³ CAR-OTP-0084-0079-R01; CAR-OTP-0072-0476.

⁴ ICC-01/05-01/08-3257-Red, para. 37.

ORDER a stay of proceedings, or, in the alternative

REMAIN SEIZED of the matter in terms of forthcoming Defence requests for investigative assistance, delay of delivery of the Judgement in the present case, and admission of materials generated from investigations into the information contained in the Prosecution's delayed disclosure.

4. The Prosecution Response, filed on 13 July 2015, illuminates its overall attitude towards disclosure in the present case. Despite numerous Defence requests, letters and emails, the Prosecution has sought to limit and avoid disclosure at all costs. In essence, the Prosecution is now trying to excuse the breaches of its disclosure violations by submitting that the Material in question later became relevant to the Article 70 investigation and case. This argument cannot succeed. The investigators' reports in question were taken in the context of Main Case investigations into the Defence witnesses. This is borne out by their timing, their content, and the fact that the Prosecution investigators state that they have been sent to 'collect information on CAR soldiers **named in the Defence list of witnesses**'.⁵ Had the Prosecution wanted to avoid its disclosure obligations in the Main Case, it was required to provide reasoned submissions to the Trial Chamber, and seek its authorisation. It never did.

5. In addition to arguing that disclosure was not warranted because the Material allegedly became relevant to the Article 70 Case,⁶ the Prosecution submits that it was justified in keeping the Material hidden because: (i) the Prosecution provided other material to the Defence concerning the credibility of its witnesses;⁷ (ii) the Prosecution's disclosure obligations are not unlimited; (iii) the issue of non-

⁵ CAR-OTP-0072-0476.

⁶ ICC-01/05-01/08-3265-Conf, para. 17.

⁷ ICC-01/05-01/08-3265-Conf, paras. 20, 22-23.

disclosure of Article 70 information in this case is *res judicata*; and (iv) the Defence is professionally accountable for its witness selection.⁸

6. **Not one** of these arguments is relevant to, or has any bearing on the question of whether the Prosecution was in breach of its disclosure obligations by failing to disclose the Material between October 2012 and June 2015. **Not one** of these arguments acknowledges the critical concession the Prosecution made by disclosing the Material under Rule 77 in the Main Case, albeit three years late. **Not one** of these arguments acknowledges that the Prosecution's unilateral 'decision to delay disclosure'⁹ would only have been possible following its authorisation by the Trial Chamber, which the Prosecution never sought.

7. Crucially, the Prosecution never denies its possession of similar investigators' reports. The Prosecution deliberately avoids addressing the Defence claim that it cannot be the case that the Prosecution **only** re-interviewed two witnesses, P-31 and P-07, once in receipt of the Defence list of witnesses in mid-2012. Instead, the Prosecution mischaracterises the Defence request as relating to material in the Article 70 Case, and spends three paragraphs arguing why the Defence team should instead get this material from the accused. This misses the point. There are undoubtedly other investigators' reports in existence. They were taken in the context of the Main Case investigations. They relate to the credibility of Defence witnesses. They should have been disclosed in 2012. Their continued non-disclosure undermines the integrity of these proceedings. Hiding behind the existence of a subsequent Article 70 investigation cannot get around these objective facts.

8. The Prosecution Response also contains a number of misleading statements of law and fact, to which the Defence submits it has a right to respond. The Defence

⁸ ICC-01/05-01/08-3265-Conf, paras. 40-43.

⁹ ICC-01/05-01/08-3265-Conf, para. 17.

accordingly seeks leave to present a focused and limited reply to the arguments contained in the Prosecution Response, in particular on the following points:

- (i) Whether the Prosecution's misrepresentation of the Trial Chamber's standard for Rule 77 disclosure,¹⁰ and the more recent appellate jurisprudence which contradicts the Prosecution's approach,¹¹ undermines its submissions on the scope of its disclosure obligations;
- (ii) Whether the Prosecution's 'decision to delay the disclosure',¹² on the alleged basis that disclosure would have 'allowed counter measures capable of undermining the entire article 70 investigation'¹³ should have been preceded by a reasoned request to the Trial Chamber responsible for overseeing the fairness of the Main Case, to be exempted from its disclosure obligations in the particular circumstances;
- (iii) Whether the Prosecution's argument that the disclosure was 'delayed' in order to safeguard its Article 70 investigation is undermined by its continued failure to disclose the Material until June 2015, a full 20 months after the arrests in the Article 70 Case.
- (iv) Whether the Prosecution's submissions that it disclosed other material relevant to the credibility of Defence witnesses can survive the Appeals Chamber's ruling that a Trial Chamber should exercise 'caution' in taking into account the disclosure of related material in assessing disclosure violations, as this approach may 'undermine the

¹⁰ ICC-01/05-01/08-3265-Conf, para. 6, citing ICC-01/05-01/08-1594-Conf, para. 21.

¹¹ ICC-02/05-03/09-501.

¹² ICC-01/05-01/08-3265-Conf, para. 17.

¹³ ICC-01/05-01/08-3265-Conf, para. 17.

paramount right of the defence to disclosure of **all** information material to the preparation of the defence'.¹⁴

- (v) The impact of the failure of the Prosecution to acknowledge that records of interviews with its own witnesses, such as P-31, are immediately disclosable to the Defence,¹⁵ and the credibility of any argument that non-disclosure of P-31's report was warranted on the basis that it contained 'mere opinion' information;
- (vi) Whether the Prosecution's attempt to justify non-disclosure of the P-07 report on the basis that it contained 'lead information which was important for the Article 70 investigation'¹⁶ can be reconciled with the fact that (a) it disclosed the report, albeit 3 years late; and (b) it (impermissibly) continues to refuse to disclose other reports detailing contact with P-07 in June 2014, July 2014, 11 November 2014 (just prior to the closing arguments in the present case), and the other contacts with a Prosecution investigator to which P-07 refers;¹⁷
- (vii) Whether the Prosecution's assertion that no prejudice arises from the late disclosure of P-07's report can be reconciled with the fact that it placed this interview in front of the present Trial Chamber in March 2013, as part of its submissions on the 'anonymous informant',¹⁸ without having disclosed it to the Defence, despite now claiming that the Prosecution's meeting with P-7 in October 2012 indeed began within the context of Defence witness credibility;¹⁹

¹⁴ ICC-02/05-03/09-501, para. 40 (emphasis added).

¹⁵ See, for example, ICC-01/04-01/06-2192-Red, para. 66.

¹⁶ ICC-01/05-01/08-3265-Conf, para. 31.

¹⁷ CAR-OTP-0082-0460-R02 at 0467.

¹⁸ ICC-01/05-01/08-3022-Conf-Anx7, para. 9.

¹⁹ ICC-01/05-01/08-3265-Conf, para. 25.

- (viii) Whether the extent to which the Prosecution Response is grounded in its Article 70 Case being credible²⁰ undermines its submissions, particularly given (a) the Trial Chamber's inability to decide on the credibility of the Prosecution's Article 70 Case; and (b) the fact that its arguments would set a precedent whereby the Prosecution could avoid its disclosure obligations by raising a subjective belief or opinion that the Defence was "coaching" its witnesses;
- (ix) The impact of the Prosecution's error in asserting that the issue of non-disclosure of Article 70 information is now *res judicata*, given its continuing duty to review whether non-disclosure is warranted or whether material is disclosable in light of present circumstances;
- (x) Whether the Defence was entitled to rely on the Prosecution's assertion to the Trial Chamber in August 2012 that it had, and would continue to, disclose 'information that newly appears to be material to the preparation of the defence, in light of the further details provided, as well as potentially exculpatory evidence that may be related to the new Defence witnesses or impeaching material that it may wish to use at trial';²¹ and
- (xi) Whether the Prosecution's submissions as to the impact and extent of its prior disclosure of the Material in the Article 70 Case are relevant, or credible, when viewed against an objective history of the Prosecution's non-disclosure, including but not limited to the fact that (a) the Material was not disclosed in the Main Case prior to June 2015; (b) P-31's report was not disclosed in either the Article 70 Case or the Main Case prior to June 2015; (c) P-07 is not a "Prosecution witness" as

²⁰ ICC-01/05-01/08-3265-Conf, paras. 5, 25-31, 37-39.

²¹ ICC-01/05-01/08-2283, para. 14.

asserted;²² (d) the version of P-07's report disclosed in the Article 70 Case in February 2014 was in extract form only, with the Prosecution having deliberately deleted information concerning D-64, D-57, D-52 and D-04, and questions asked about other Defence witnesses;²³ (e) the version of P-07's report disclosed in the Article 70 Case in June 2014 was heavily redacted, with the redactions notably including the witness' name, being key to understanding his link to D-23;²⁴ (f) the disclosure in the Article 70 Case was made 20 months after the report was first generated, and three weeks after the Prosecution filed its Closing Brief in the Main Case;²⁵ and (g) the Prosecution refused to disclose the P-07 report in the Main Case, despite a specific request from Lead Counsel to the Prosecution Senior Trial Attorney.²⁶

9. There is good cause for the Defence to be accorded an opportunity to address the above issues. The Defence submits that a limited and focused reply may benefit the Chamber in its determination of an issue critical to the fair trial rights of the accused and the conduct of the proceedings. Affording the Defence a right of reply is accordingly in the interests of justice.²⁷

D. REQUESTED RELIEF

10. Given the above, the Defence respectfully requests that the Chamber:

GRANT the Defence request for leave to reply to the Prosecution's Response to 'Defence request for a stay of proceedings and request for further disclosure'.

²² ICC-01/05-01/08-3265-Conf, para. 25 (emphasis in original).

²³ ICC-01/05-01/08-3265-Conf-AnxB.

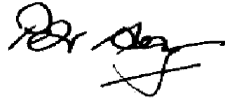
²⁴ CAR-OTP-0072-0476-R01.

²⁵ ICC-01/05-01/08-3079.

²⁶ ICC-01/05-01/08-3020-AnxB-Red, Letter Defence to Mr. Badibanga, 20 February 2014, pp.3-4.

²⁷ ICC-01/05-01/08-2942, para. 4.

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 for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

21 July 2015