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

Date: 31/07/2015

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

With confidential ex parte Annexes A and B (Prosecution and Defence only)

**Public Redacted version of Defence Request for Leave to Reply to the
'Prosecution's Response to "Further 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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A. INTRODUCTION

1. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence seeks leave of Trial Chamber III ('the Trial Chamber') to reply to the Prosecution's Response to "Further Defence Request for Disclosure" ('Prosecution Response').¹ The Defence submits that a limited reply will assist the Chamber in its determination of the Defence Request.²

B. SUBMISSIONS

2. The Prosecution Response is scathingly critical of the Defence for raising disclosure violations with the Trial Chamber at the 'critical juncture of deliberations',³ and asserts that the Defence Request is inappropriate, and 'spurious'.⁴

3. The Defence, whose client Mr. Bemba bears the weight of any further delays in the judgment drafting process, seized the Trial Chamber only after *inter partes* efforts to obtain disclosable material had (again) failed. The late stage of the proceedings is extremely unfortunate. The Prosecution's conduct gives rise to no other option.

4. It is only upon the Defence seizing the Trial Chamber, that the Prosecution has provided reasons for the non-disclosure of material being sought. Excuses for late disclosure, such as the Prosecution 'inadvertently omitt[ing] to disclose the last two of the batch of documents concerned'⁵ are now being relayed to the Defence for the first time. Significantly, the Prosecution's purported justifications for non-disclosure reveal inconsistencies in the submissions being made by the Prosecution

¹ ICC-01/05-01/08-3265-Conf.

² ICC-01/05-01/08-3264-Red2 ('Defence Request').

³ ICC-01/05-01/08-3275-Conf-Exp, para. 24.

⁴ ICC-01/05-01/08-3275-Conf-Exp, para. 24.

⁵ ICC-01/05-01/08-3275-Conf-Exp, para. 12.

across the two cases. For example, concerning the (still) undisclosed contact between its investigator and D-02 and D-03,⁶ the Prosecution has asserted in the Article 70 Case:⁷

[REDACTED].

Concerning the exact same contact between its investigator and D-02 and D-03,⁸ the Prosecution has now submitted in the Main Case:⁹

The purpose of those phone contacts **was simply to schedule meetings** between the Prosecution and the two witnesses.

5. Having not seen the documents in question, the Defence can have no idea which version is correct. Regardless, given that much of the Prosecution Response is premised on unfounded (and un-footnoted) assertions about when it received certain material, and what it actually reviewed upon receipt,¹⁰ these inconsistent statements are directly relevant to its credibility in the eyes of the Trial Chamber. They are directly relevant to whether the Prosecution can continue to be taken at its word.

6. However, the central and fundamental flaw in the Prosecution Response is its insistence that the fact that it has sought delayed disclosure in the Article 70 Case means that it is unilaterally excused from its disclosure obligations in the Main Case. It ridicules the Defence for providing 'no explanation as to why it cannot wait for VWU's implementation of TC VII's orders' in the Article 70 Case, and questions

⁶ CAR-OTP-0080-0494 at 0498; CAR-OTP-0080-0165 at 0168.

⁷ [REDACTED].

⁸ CAR-OTP-0080-0494 at 0498; CAR-OTP-0080-0165 at 0168.

⁹ ICC-01/05-01/08-3275-Conf-Exp, para. 15.

¹⁰ ICC-01/05-01/08-3275-Conf-Exp, paras. 20, 23.

why the Trial Chamber should be ‘exceptionally engaged’ on the issue of disclosure of Main Case witnesses.¹¹

7. The Prosecution’s approach is completely backwards. Material generated during the course of contact with the Prosecution and Defence witnesses is disclosable to the Defence in the Main Case.¹² Material generated during the course of contact with P-261 was immediately disclosable to the Defence in the Main Case upon its creation. A request for delayed disclosure in the Article 70 Case does not mean that these obligations simply disappear into thin air. The Defence in the Main Case is not required to ‘wait’ for the Prosecution to gain a strategic advantage for itself in other proceedings.

8. Nor is the Trial Chamber ‘exceptionally engaged’ on the issue of disclosure of Main Case witnesses. The Trial Chamber has a ‘duty to ensure that the prosecution fulfills its disclosure obligations’.¹³ It is neither required, nor permitted, to delegate this duty to Trial Chamber VII, as much as this would serve the purposes of the Prosecution, and streamline its work. This is not a case of matters being ‘central to the charges before another Chamber’ being litigated in parallel.¹⁴ It is a case of the Prosecution simply ignoring its disclosure obligations in the Main Case, and hoping the Trial Chamber will simply defer to any and all measures ordered by another Chamber. The Main Case continues to exist. The Trial Chamber’s rulings as regards disclosure of Prosecution contact with Defence witnesses continue to exist.¹⁵ If the Prosecution wanted to withhold disclosure in the Main Case, it was required to seek authorisation from the Trial Chamber before doing so.

¹¹ ICC-01/05-01/08-3275-Conf-Exp, para. 7.

¹² ICC-01/05-01/08-3070, para. 25.

¹³ ICC-01/05-01/08-2292, para. 7.

¹⁴ ICC-01/05-01/08-3275-Conf-Exp, para. 8.

¹⁵ ICC-01/05-01/08-3070.

9. Given these, and other flaws in the Prosecution's submissions, Defence seeks leave to present a focused and limited reply the arguments contained in the Prosecution Response, in particular on the following points:

- (a) Whether the Prosecution has erred in law in adopting the 'legitimate forensic purpose' test to the disclosure of material generated during Prosecution contacts with Defence witnesses in the same case,¹⁶ particularly when the mere existence of contact can be material to Defence preparation;
- (b) Whether the Prosecution is only required to disclose audio recordings of interviews with Defence witnesses in the absence of a dispute regarding the quality of the transcription or accuracy of the translation, particularly when such (a) a comparison is rendered impossible by the non-disclosure of the audio records; and (b) numerous errors in the Prosecution's transcription and translation of telephone intercepts have already been identified in the Article 70 Case;¹⁷
- (c) Whether the Prosecution's approach usurps the Trial Chamber's functions under Article 67(2), and runs counter to the Appeals Chamber's judgment in *Lubanga*,¹⁸ which prevents the Prosecutor from taking steps which would prevent the Trial Chamber from being the final arbiter of whether documents should be disclosed to the Defence, and assessing the impact of non-disclosure on the fairness of the proceedings;

¹⁶ ICC-01/05-01/08-3275-Conf-Exp, para. 15.

¹⁷ [REDACTED].

¹⁸ ICC-01/04-01/06-1486, paras. 3, 4, 44-46.

- (d) The consequences of the Prosecution ignoring that a Trial Chamber is 'ill-equipped' and 'realistically unable' to make decisions on the protective measures necessary in another case, and that both Trial Chambers concerned 'must arrive at their own separate conclusions' depending on 'the issues which need to be balanced in the different cases',¹⁹ particularly given that [REDACTED].

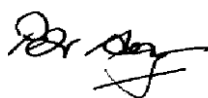
10. There is good cause for the Defence to be accorded an opportunity to address the above issues. The Defence submits that a limited and focused reply may benefit the Chamber in its determination of an issue critical to the fair trial rights of the accused and the conduct of the proceedings. Affording the Defence a right of reply is accordingly in the interests of justice.²⁰

D. REQUESTED RELIEF

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

GRANT the Defence request for leave to reply to the Prosecution's Response to "Further Defence Request for Disclosure"

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

¹⁹ ICC-01/04-01/06-2190-Red, para. 26.

²⁰ ICC-01/05-01/08-2942, para. 4.

31 July 2015