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

Date: **11/01/2016**

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 the ‘Prosecution’s Response to “Defence request for disclosure of further material”’

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. SUBMISSIONS

(a) Reliance on documents disclosed in the Article 70 Case

1. The Prosecution is refusing to disclose documents which are relevant to the preparation of the Defence in the Main Case. Its justification for this refusal is that the Defence has access to the documents in question. It asserts further that “(t)he Defence is entitled to rely on (the documents) without formal disclosure in the main case.

2. This, with respect, cannot possibly be the position. The Prosecution has an ongoing duty to review all the materials in its custody in order to determine what is disclosable with respect to the specific facts, issues, and charges in this case. The incidental and belated receipt of some materials *via* the Article 70 case does not fulfill this duty but rather confirms the Prosecution’s failure to conduct an ongoing disclosure review as concerns the particular factual and legal matrix of this case. The prejudice which ensues from such a flawed approach is particularly acute given the advanced stage of this case, and the likelihood that an Article 70 driven disclosure process would omit materials that are not linked to issues in the Article 70 case.

3. The parties have also been governed by a detailed regime for the disclosure, use and admission of documents in the present case. Just because a Counsel has access to a document from a different case does not entitle him or her to rely on or use it. The position is a marked departure from both the Prosecution’s own consistent practice,¹ and that of both Trial Chambers III and VII.² It is a transparent attempt to avoid disclosure, and deprive the accused of his right to a remedy in the present proceedings.

(b) Disclosure of contact with D-55

4. The Prosecution claims to have disclosed relevant materials originating from its contact with D-55 in the context of the Main Case.³ The Prosecution relies on: “CAR-OTP-0056-0315, the statement given by D-55 to the Prosecution in the context of the main case,

¹ See ICC-01/05-01/08-3254-Conf-AnxA and ICC-01/05-01/13-984-Conf-AnxA and Conf-AnxB where the same 26 documents were disclosed to the Defence in Main Case on 6 June 2014 and in Article 70 on 4 June 2015; ICC-01/05-01/08-3262-Conf-AnxA and ICC-01/05-01/13-1042-Conf-AnxA where the same 3 documents were disclosed to the Defence in Main Case and in Article 70 on 26 June 2015; ICC-01/05-01/08-3278-Conf-AnxA and ICC-01/05-01/13-1117-Conf-AnxA and Conf-AnxB where the same 37 documents were disclosed to the Defence in Main Case and in Article 70 on 31 July 2015.

² Email Trial Chamber to the Defence ‘URGENT - Reclassification of Chamber's decision’, 29 September 2015 at 14:09; See ICC-01/05-01/13-1023-Conf; ICC-01/05-01/13-1030-Conf; ICC-01/05-01/13-1031-Conf; ICC-01/05-01/13-1154.

³ ICC-01/05-01/08-3307-Conf, para. 22.

which was disclosed on 20 May 2010.”⁴ In fact, CAR-OTP-0056-0315 is a statement given by P-213, [REDACTED].

5. The Prosecution’s submission appears to be a deliberate attempt to mislead the Trial Chamber. The Prosecution took 21 days to draft its 14-page response, making this submission unlikely to be an oversight. Nor has the Prosecution sought to correct its filing, despite having been alerted to this problem on 18 December 2015.⁵ Moreover, this assertion must be viewed against the history of the Prosecution’s misrepresentations and wholly inconsistent statements over the course of the present proceedings:

- On 11 September 2012, the Prosecution told the Trial Chamber during a status conference that [REDACTED].⁶ By this time, the Prosecution had already divulged the names of Defence witnesses to the French authorities,⁷ and would shortly give the entire list of Defence witnesses to Western Union’s Global Investigation Department.⁸ The Prosecution then provided the names of Defence witness to the authorities in both Cameroon,⁹ and the DRC.¹⁰ The Prosecution then stated on 3 March 2014 that “**no confidential information concerning the Defence case** or which identified Defence witnesses as such was divulged **to any external sources**.”¹¹
- The Prosecution made repeated assertions, relied upon by the Trial Chamber, that it had acted in compliance with its disclosure obligations.¹² Following these submissions, in June 2015, the Prosecution finally disclosed interviews with its own witnesses **conducted in 2012** concerning the credibility Defence witnesses which it then disclosed under Rule 77.¹³

⁴ ICC-01/05-01/08-3307-Conf, fn. 19.

⁵ ICC-01/05-01/08-3308-Conf.

⁶ ICC-01/05-01/08-T-241-CONF-EXP-ENG, p. 25, lines 4-9.

⁷ CAR-OTP-0091-0679.

⁸ CAR-OTP-0092-0018.

⁹ CAR-OTP-0091-0326-R01.

¹⁰ CAR-OTP-0091-0481-R01.

¹¹ ICC-01/05-01/08-3016-Conf-AnxB, p.18.

¹² See, for example, ICC-01/05-01/08-3039, paras. 2, 10; ICC-01/05-01/08-3229-Red2, para. 46; ICC-01/05-01/08-3255, para. 84: ‘The Chamber notes that the relevant material was subsequently disclosed on 22 July 2014’; para. 85: ‘In addition, while the Defence submits that “[k]ey material remains undisclosed’... the Chamber does not consider it possible to determine whether any such disclosable material remains undisclosed on the basis of the cited letter and as such finds the Defence’s submissions speculative’.

¹³ ICC-01/05-01/08-3254-Conf-AnxA.

- The Prosecution stated in an *ex parte* filing that contact between its investigator and D-02 and D-03 “was simply [REDACTED].”¹⁴ It later asserted that “these conversations **concerned security matters raised** independently by the witnesses.”¹⁵
- The Prosecution informed the Defence on 3 March 2014 that “the anonymous informant did not furnish the Prosecution with the name of any witness.”¹⁶ However, it subsequently confirmed to His Honour Judge Tarfusser that “the informant provided reliable information **on the identity** and travel itineraries of one Defence witness”.
- The Prosecution told the Defence in September 2014 that contact between the Prosecution and P-169 was made “jointly with the VWU following Trial Chamber III’s instruction.”¹⁷ In October 2014, however, it became clear that in April 2012, P-169 had been instructed to communicate with the Prosecution through [REDACTED],¹⁸ and not jointly with VWU as previously asserted.
- On 11 September 2012, the Prosecution informed the Trial Chamber during a Main Case status conference that [REDACTED].”¹⁹ The Prosecutor then gave an interview to *Jeune Afrique*. She is quoted in the interview as saying that “[d]ans le cas Bemba, nous avons été en mesure de démontrer que c’est la défense qui a présenté ou fabriqué de fausses preuves et que des témoins ont fait l’objet de tentatives de corruption.»²⁰ The Prosecution has not established these facts in the Article 70 Case, the evidence of which is still being heard by Trial Chamber VII;
- The Prosecution put to Defence witness D-18, during his testimony, that he had met the Defence military expert General Seara in the presence of former Lead Counsel Kilolo, and then asserted to the Trial Chamber that it would provide a reference to contradict D-18’s denial. The reference ultimately provided to the Trial Chamber **demonstrated the**

¹⁴ ICC-01/05-01/08-3275-Conf-Exp, para. 15.

¹⁵ Letter from Kweku Vanderpuye to the Bemba Defence, 11 July 2015.

¹⁶ ICC-01/05-01/08-3016-Conf-AnxB, p. 18.

¹⁷ Email from Jean-Jacques Badibanga to the Defence, 19 September 2014 at 10.02.

¹⁸ ICC-01/05-01/08-3160-Conf-AnxA.

¹⁹ ICC-01/05-01/08-T-241-CONF-EXP-ENG, p. 25, lines 4-9.

²⁰ <http://www.jeuneafrique.com/Article/JA2820p028.xml0/cpi-justice-interview-fatou-bensoudafatou-bensouda-en-c-te-d-ivoire-personne-ne-sera-pargn.html>

opposite of the Prosecution's assertion to the witness.²¹ No retraction, correction or apology was ever offered.

6. These repeated incidents amount to a consistent and systemic practice of misleading both the Defence and the Trial Chamber, and failing to correct or retract statements which were expressly false. The Prosecution's statement that it has disclosed "relevant materials originating from its contacts with D-55 in the context of the main case" is demonstrably false and should be rejected by the Trial Chamber.

(c) The redactions to CAR-OTP-0089-1332_R01

7. The Prosecution's assertion that the Defence request for a non-redacted version of document CAR-OTP-0089-1332_R01 is an attempt to circumvent witness protective measures authorised by Trial Chamber VII²² is unhappily another blatant attempt to mislead the Trial Chamber. The relevant protective measures in the Article 70 Case were not authorised by the Trial Chamber, but rather implemented directly by the Prosecution under Rule 81(1). Nor have they been vetted by Trial Chamber VIII. As such, there is no obstacle to the Trial Chamber in the present case lifting these redactions, a practice which would be consistent with the Trial Chamber's functions under Article 67(2), and the Appeals Chamber's judgment in *Lubanga*,²³ which prevents the Prosecutor from taking steps which would prevent the Trial Chamber from being the final arbiter of whether documents should be disclosed.

(d) Use of the Financial Records in the Main Case

8. Neither is the Prosecution's assertion that it "did not use the Financial Records in this case"²⁴ correct. During an *ex parte* Status Conference on 3 April 2012, the Prosecution made detailed submissions on the financial records it had obtained from Western Union.²⁵ The Prosecution then filed a detailed document entitled "Break down of the money paid using Western Union"²⁶ as an *ex parte* annex to the Trial Chamber in support of a request for investigative assistance. The Prosecution's conduct of introducing these documents and

²¹ T-232-Conf-ENG-ET, p. 54, line 13 et seq: "Regarding whether or not the Defence was represented during those interviews, there were no members of the Defence team with me."

²² ICC-01/05-01/08-3307-Conf, para. 20.

²³ ICC-01/04-01/06-1486, paras. 3, 4, 44-46.

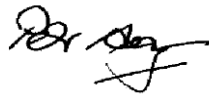
²⁴ ICC-01/05-01/08-3307-Conf, para. 38.

²⁵ T-303-CONF-Red2-ENG-ET, p.5, lines 10-12; p.7, line 22 – p.8, line 1; p.8, line 15 – p.9, line 12; p.27, lines 6-18; p.29, lines 9-18.

²⁶ ICC-01/05-01/08-2548-Conf-AnxA, entitled "Break down of the money paid using Western Union".

providing them to the Trial Chamber undermine any argument that the Prosecution did not use them in the Main Case, and provide further support for the Defence request for disclosure.

The whole respectfully submitted.



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Done at The Hague, the Netherlands, 11 January 2016