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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**

Public

**Public Redacted Version of Defence Request for Leave to 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. 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 "Defence request for disclosure of further material" ('Prosecution Response').¹

2. For the reasons set out below, the Defence submits that a limited and focused reply will assist the Chamber in its determination of the Defence Request.²

B. SUBMISSIONS

3. On 11 September 2012, the Prosecution made the following representation to the Trial Chamber during a Main Case status conference:³

[REDACTED].

4. By virtue of disclosure in the Article 70 Case, the Defence is now aware that at the time of this statement, the Prosecution had already divulged the names of Defence witnesses to the French authorities,⁴ and would shortly give the entire list of Defence witness names to Western Union's Global Investigation Department.⁵ The Prosecution then provided the names of Defence witness to the authorities in both Cameroon,⁶ and the DRC.⁷

¹ ICC-01/05-01/08-3307-Conf.

² ICC-01/05-01/08-3305-Conf ('Defence Request').

³ ICC-01/05-01/08-T-241-CONF-EXP-ENG, p. 25, lines 4-9.

⁴ CAR-OTP-0091-0679.

⁵ CAR-OTP-0092-0018.

⁶ CAR-OTP-0091-0326-R01.

⁷ CAR-OTP-0091-0481-R01.

5. Having done so, the Prosecution again stated on 3 March 2014 that “[n]o confidential information concerning the Defence case or which identified Defence witnesses as such was divulged to any external sources.”⁸

6. The Prosecution Response is notable for its wholesale failure to respond to the Defence arguments that many of the identified documents are material to the preparation of the Defence because they demonstrate that representations made by the Prosecution in the Main Case are not, in fact, correct.⁹ The Prosecution does not seek to correct or explain prior inconsistent statements raised by the Defence, but rather ignores these submissions in an apparent attempt to have the Trial Chamber do the same.

7. Moreover, the Prosecution Response contains further alarming misrepresentations which the Defence is now compelled to correct. To give just one example, the Prosecution urges the Trial Chamber to reject the Defence request for disclosure of material arising out of its contact with D-55, by stating that it has already disclosed relevant materials originating from its contact with D-55 in the context of the Main Case.¹⁰ The Prosecution relies on:¹¹

“CAR-OTP-0056-0315, the statement given by D-55 to the Prosecution in the context of the main case, which was disclosed on 20 May 2010.”

8. In fact CAR-OTP-0056-0315 is a statement given by P-213 [REDACTED] to the Prosecution on 7 December 2009. It is not a statement of D-55. It does not demonstrate that the Prosecution has complied with its disclosure obligations, nor

⁸ ICC-01/05-01/08-3016-Conf-AnxB, p.18.

⁹ ICC-01/05-01/08-3305-Conf, paras. 29-31, 41.

¹⁰ ICC-01/05-01/08-3307-Conf, para. 22.

¹¹ ICC-01/05-01/08-3307-Conf, fn. 19.

that it has disclosed “relevant materials originating from its contacts with D-55 in the context of the main case”. These materials, remain undisclosed.

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

- (a) Whether the Prosecution has erred in law and in fact by asserting that the Defence is entitled rely on documents in the Main Case without formal disclosure in that case;¹²
- (b) Whether the Prosecution erred in stating it had already disclosed relevant materials originating from its contacts with D-55 in the context of the Main Case;¹³
- (c) Whether the Prosecution’s erred in asserting 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 VII,¹⁴ when the witness protective measures in the Article 70 Case were not authorized by the Trial Chamber but rather implemented directly by the Prosecution;
- (d) Whether the Prosecution erred in stating that the Defence argued that “the Prosecution violated investigative protocols by **contacting** protected Defence witnesses”¹⁵ when the Defence in fact impugned the Prosecution’s requests to state authorities to

¹² ICC-01/05-01/08-3307-Conf, para. 13.

¹³ ICC-01/05-01/08-3307-Conf, para. 22.

¹⁴ ICC-01/05-01/08-3307-Conf, para. 20.

¹⁵ ICC-01/05-01/08-3307-Conf, para. 29.

locate Defence witnesses; and whether this error undermines the Prosecution's reliance on prior rulings of the Trial Chamber;¹⁶

- (e) Whether the Prosecution's submission that it "did not use the Financial Records in this case"¹⁷ can be reconciled with its express reliance on those Financial Records in its submissions to this Trial Chamber;¹⁸ and
- (f) Whether the Prosecution erred in deliberately electing to prioritise its investigations in a potential Article 70 Case over complying with its disclosure obligations in the Main Case in the absence of any authorisation from the Trial Chamber for non-disclosure.¹⁹

10. There is good cause for the Defence to be accorded an opportunity to address the above issues. Firstly, the Prosecution's assertion that "the Defence is entitled to rely on [materials] without formal disclosure in the main case"²⁰ is a significant submission which not only runs counter to the practice of both Trial Chambers III and VII, but has significant implications for the future conduct of both cases. Given the Prosecution's practice of disclosing the same materials in both Article 70 Case and the Main Case, Defence could not have anticipated that this was the Prosecution's position at the time of filing the Defence Request. As such, the interests of justice militate in favour of a Defence reply.²¹

¹⁶ ICC-01/05-01/08-3307-Conf, fn. 30.

¹⁷ ICC-01/05-01/08-3307-Conf, para. 38.

¹⁸ ICC-01/05-01/08-2548-Conf-AnxA, entitled "Break down of the money paid using Western Union" filed by the Prosecution in the Main Case; ICC-01/05-01/08-2548-Conf-Red; 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.

¹⁹ ICC-01/05-01/08-3307-Conf, para. 37.

²⁰ ICC-01/05-01/08-3307-Conf, para. 2.

²¹ ICC-01/05-01/08-2942, para. 4.

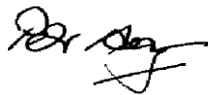
11. Secondly, the Prosecution has misrepresented the content of documents,²² and has made statements in its Response which simply do not accord with the reality of its conduct.²³ The Defence accordingly seeks to assist the Trial Chamber by correcting the record on questions which are of key importance to the overall fairness of the proceedings, and anticipates being able to do so in a limited and focused manner.

C. REQUESTED RELIEF

12. 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 Disclosure of Further Materials"

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel for Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

12 January 2016

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

²³ ICC-01/05-01/08-3307-Conf, para. 38.