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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 Redacted Version

Response to the Prosecution's Application to Submit Additional Evidence

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. The Prosecution Request[1] is without merit. Through the device of an alleged application to extend a time limit, the Prosecution is attempting to seek leave to present further evidence in the trial. Having made a conscious choice not to use this evidence during its examination of Defence witnesses, the Prosecution's attempt to introduce this material at a time convenient to the Office of the Prosecutor in the dying days of a three-year trial must fail.

2. The Prosecution has failed to identify, let alone disclose the allegedly relevant material, precluding either meaningful submissions or a reasoned decision on the relief which it impermissibly seeks. Moreover, if the unidentified material does, as vaguely alleged, "completely refute the credibility of Defence evidence led in this trial"[2] it is not only inadmissible *per se*, but the impact of its admission would render any expeditious conclusion of Mr. Bemba's trial utterly unattainable.

B. BACKGROUND

3. Mr. Bemba has been incarcerated for nearly six years, since March 2008. The case against him opened on 22 November 2010, and has so far run for over three years.

4. The Defence began presenting witnesses on 14 August 2012.[3] The Chamber ordered the Defence to conclude the presentation of its witnesses by 25 October

[1] ICC-01/05-01/08-2910 (hereinafter "Prosecution Request" or "Request").
[2] ICC-01/05-01/08-2910, para. 5.
[3] ICC-01/05-01/08-T-236-ENG.

2013.[4] As a result of the obstacles encountered in presenting the evidence of certain witnesses, the Chamber subsequently:[5]

> EXTEND[ED] the deadline for the defence to present the testimony of Witnesses D04-14 and D04-44, provided that they both complete their testimony by 15 November 2013, at the latest.

5. While the Defence met this deadline, the presentation of evidence has not yet closed. In a status conference held on 28 November 2013, the Trial Chamber was explicit that: [6]

> a decision declaring the presentation of evidence in the case closed pursuant to Rule 141 of the Rules will only be taken once the Chamber has decided on the admissibility into evidence of all materials submitted by the parties or participants by the Chamber.

6. From information recently made available to the Defence, it appears that the Prosecution [REDACTED].[7]

7. Having made no mention of this course of action at a status conference on 28 November 2013, the following day the Prosecution filed an application to "submit" the additional evidence. While neither disclosing nor identifying this additional evidence with any particularity, the Prosecution seeks to "submit one audio recording, one report, and one financial chart".[8] The Prosecution asserts that this material "affects the testimony of fourteen (14) Defence witnesses."[9] The Prosecution Request gives no further details of either the content of these materials,

[4] ICC-01/05-01/08-2731, para. 38.
[5] ICC-01/05-01/08-2861, para. 11.
[6] ICC-01/05-01/08-T-359-ENG, 28 November 2013, pp.10-11.
[7] [REDACTED].
[8] ICC-01/05-01/08-2910, para. 8.
[9] ICC-01/05-01/08-2910, para. 8.

the means by which they were obtained, their relevance to the testimony of Defence witnesses, their provenance, reliability, or the purpose for which "submission" is sought.

C. SUBMISSIONS

(a) The Prosecution is impermissibly seeking to present a rebuttal case

8. The Prosecution has failed to discharge its burden clearly to state the relief, which it seeks and the legal basis for the relief, presumably due to the lack of a well-founded legal or factual basis for the Request.

9. The Prosecution Request purports to be seeking an extension of time from the *Decision on the time limit for the conclusion of the defence's presentation of oral evidence at trial* of 1 November 2013.[10] This decision set a deadline of 15 November 2013 for the conclusion of the testimony of Defence Witnesses D04-14 and D04-44. It was a deadline applicable to the Defence, which, having been met, has since expired. As such, there is simply no deadline to extend, and the relief the Prosecution seeks is baseless.

10. The Trial Chamber also set out a clear deadline in its decision of 30 October 2013 for the parties to submit final requests for the submission of any additional evidence, before the closure of the evidential phase of the case.[11] The Prosecution did not seek an extension of time before the expiration of this deadline, and has utterly failed to meet their burden of demonstrating why a *post facto* extension of time is warranted. There is no indication that the Prosecution alerted the Chamber to the possibility that they might need to tender new evidence, as soon as they

[10] ICC-01/05-01/08-2910, para. 1, footnote 1.
[11] ICC-01/05-01/08-2855, para. 10.

became aware of it, nor have they referred to any other steps that they could have taken to meet their obligation of diligence or to mitigate the potential prejudice to the Defence.

11. In determining whether to allow the Prosecution to introduce additional evidence after the expiration of deadlines for doing so, ICC Chambers have considered, *inter alia*,

> (a) whether the Prosecution failed to adopt an appropriate strategy for identifying and collecting the material at an earlier stage;[12]
>
> (ii) whether the Prosecutor brought to the attention of the Chamber in a timely manner the difficulties it was experiencing in obtaining the evidence in question; and[13]
>
> (iii) whether the OTP has in fact obtained the additional evidence, and is in a position to disclose to the defence in a timely manner, as opposed to mere speculation that it intends to obtain it.[14]

12. The Prosecution has completely failed to satisfy these criteria. [REDACTED].[15] Indeed, in its Request, the Prosecution explicitly states that the Prosecution "became aware of the information during the Defence case",[16] and that the possibility that its Rule 70 investigations would have an "impact on the present case was reasonably foreseeable".[17] Nonetheless, at no stage did the Prosecution request an adjournment in order to collect or tender relevant evidence prior to its cross-examination of Defence witnesses, who were the subject of these Article 70 investigations. At the very least, the Prosecution could have referred to the possibility that it needed additional time to prepare for its cross-examination of the witnesses in question in connection with the scheduling of these witnesses, and the

[12] ICC-01/05-01/08-680, para 12.
[13] ICC-01/05-01/08-680, para 12.
[14] ICC-01/05-01/08-680, para 12.
[15] [REDACTED].
[16] Prosecution Request, para. 2.
[17] Prosecution Request, para. 2.

timing of the Defence case. Instead, the Prosecution remained silent, and therefore accepted the consequences of failing to assert its potential rights in a timely manner.[18]

13. [REDACTED], the Prosecution failed to raise such matters during cross-examination or to put its case on such matters to many of the witnesses now allegedly impacted by this investigation.[19] In this regard, the Prosecution explicitly argued prior to the commencement of this trial that it would be deleterious to the fair and expeditious conduct of the proceedings if a right to tender rebuttal evidence were to ensue from a party's failure to put its case to the witness.[20] Although the Prosecution was addressing the scenario in which the Prosecution may be compelled to call rebuttal evidence due to the failure of the Defence to put its case to Prosecution witnesses, the negative impact on the fairness of the proceedings is further exacerbated in cases in which the Prosecution is seeking to introduce rebuttal evidence as concerns issues which the Prosecution itself, failed to put to the witnesses.[21]

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[18] The Appeals Chamber has found that in line with overarching emphasis on expeditious proceedings, a party might waive a putative right unless it asserts it in a timely manner: *Prosecutor v. Katanga and Ngudjolo*, Judgement on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", at para. 53-54; ICC-01/04-01/07-2259, at para. 54

[19] In its decision on the Prosecution request for leave to appeal the decision on the conduct for the proceedings, the Trial Chamber disagreed with the argument of the Prosecution that the terms of the Chamber's decision had not imposed an obligation on the parties to put their case to the witnesses, or in any way minimised Counsel's obligations as concerns the submission of evidence: ICC-01/05-01/08-1086, para.22. This Trial Chamber has also recognised that fairness to a witness requires the cross-examining party to put their case to them: ICC-01/05-01/08-T-222-ENG, pages 7-8.

[20] ICC-01/05-01/08-1086, paras. 8-10.

[21] For this reason, Trial Chamber II observed that "Cross-examination allows the party not calling the witness to elicit all further relevant evidence as may be useful for the case of that party or necessary for the determination of the truth. It is therefore incumbent upon the cross-examining party to put all questions it may have for the witness during this occasion. In principle, the Chamber will not allow a party to re-call a witness if it already had the opportunity to cross-examine him or her". ICC-01/04-01/07-2665, para. 73.

14. In particular, if the evidence which the Prosecution is now seeking to admit was in the possession of the Prosecution during the Defence case, and the Prosecution declined to tender it through relevant Defence witnesses, then the Prosecution must be considered to have waived its right to do so.

15. As will be elaborated below in section c), the Prosecution's failure to comply with the requirements for admitting evidence after the close of both its own case and that of the Defence is compounded by the Prosecution's failure to disclose the evidence itself to the Defence in a timely manner, which in turn, prevents the Defence from being able to make informed submissions concerning the credibility and probative value of the evidence in question.

16. If the Prosecution is in possession of the evidence, but has failed to disclose it to the Defence, then their failure to do so constitutes a grave disclosure violation, which in itself, warrants the exclusion of the evidence in question. The Prosecution is well aware that any information or material which could be relevant to the credibility of Defence witnesses must be disclosed to the Defence expeditiously.[22] As recently reiterated by this Trial Chamber:[23]

> as an on-going obligation during the trial proceedings, [the prosecution] shall disclose any Article 67(2) items or permit the defence to inspect any Rule 77 material in its possession or control, promptly upon their identification, throughout the presentation of evidence by the defence.

17. This obligation applies irrespective of whether the Prosecution has made a decision to use the evidence in question or not, and continues throughout the trial

[22] *Prosecutor v. Lubanga*, Decision on the scope of the Prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624.
[23] Decision on "Defence Motion Regarding Prosecution Disclosure", 3 September 2012, ICC-01/05-01/08-2292, paragraph 9. See also Decision on the Defence request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-RED, para. 34.

proceedings.[24] Although the Request is framed ambiguously, the obvious inference to be drawn from its terms is that the Prosecution was in possession of the evidence during the time period when the Defence witnesses were testifying, but elected not to disclose it ("*The prior disclosure to the Defence and presentation of this evidence during trial without proper investigation would have been imprudent and lacked proper due diligence […]*").[25] The only reasonable conclusion from the Prosecution's submissions on this point is that the Prosecution was in possession of the current evidence, but, because it did not wish to tender it as evidence at that point in time, also decided not to disclose it to the Defence.

18. If the Prosecution was indeed in possession of the evidence at the time when witnesses affected by this evidence testified, then its strategic choice to withhold the evidence from the Defence both undermines its right to invoke Regulation 35(2) at this juncture, and attracts an exclusionary remedy in order to counterbalance the prejudice caused to the Defence. In this regard, the Chamber rejected the Defence argument that the accused would be prejudiced by being compelled to submit his evidence "before having a complete picture of the Prosecution case against him" because, as underscored by the Chamber,

> "any documents that the prosecution might submit up to 8 November 2013 would have been disclosed to the defence well in advance of that date. As such the defence has been informed of all the evidence which is to be used against the accused at trial"(emphasis added).[26]

[24] "The prosecution's disclosure obligations continue throughout the trial, and once fresh items are identified that should be provided to the defence, this is to be effected expeditiously", *Prosecutor v. Lubanga*, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624 at para. 20. See also ICC-01/04-01/07-T-230-ENG, pages 3-5, where Trial Chamber II refers to the obligation to disclose such evidence at the earliest possible opportunity.
[25] Prosecution Request, para. 3.
[26] ICC-01/05-01/08-2855, para. 12.

19. The Prosecution has ridden roughshod over the safeguards cited by the Chamber by first waiting for the Defence to file its final list of evidence, which was based on the Defence's understanding of the totality of the Prosecution's evidence against Mr. Bemba, and then submitting the present Request, which seeks the admission of evidence that the Prosecution has never disclosed.

20. It would be a breach of the Prosecutor's duty to act as an impartial minister of justice to withhold evidence, which was material to the preparation of the Defence, simply because the Prosecution wanted to prioritise its Article 70 case. In effect, the Prosecution withheld key evidence, which by its own admission, was foreseeably relevant to the ongoing Defence case, and which would have impacted on the decision of the Defence to waive its right to silence and put forward a positive Defence case. For this reason, the ICTY Appeals Chamber has deprecated the use of "sharp trial tactics", such as the belated disclosure of highly inflammatory or prejudicial allegations after the close of the Defence case.[27]

21. Although the Prosecution has averred, without <u>any</u> explanation, that disclosure could have jeopardized ongoing investigations, the Prosecution could and should have sought the prior authorisation of the Chamber to withhold the evidence in question. The Chamber would then have been in a position to review the status as concerns the necessity of the non-disclosure, and to take counterbalancing measures to remedy any prejudice that could ensue to the Defence.

22. In this regard, the Prosecution's failure to disclose the evidence or information in question has irreversibly prejudiced the Defence. The mere issuance of shadowy and unsubstantiated allegations has cast a *post facto* patina of suspicion over Defence witnesses, who were unfairly deprived of the ability to address or

[27] *Prosecutor v. Krstic*, Appeals Judgment, 19 April 2004, IT-98-33-A, at para. 174.

respond to the allegations in a timeous manner. In light of the demonstrated difficulties faced by the Defence in calling the witnesses in the first place, it cannot be presumed that the Defence will have the ability to re-interview or recall them in order to respond to these highly prejudicial insinuations, or to conduct further ancillary investigations.

23. In light of the advanced stage of the proceedings, the prolonged and egregious nature of the non-disclosure, and the prejudicial impact on the rights of the Defence, the only appropriate remedy is to refuse the Prosecution Request.

24. Although framed as a request for an extension of time, given the current stage of the proceedings, any additional evidence by the Prosecution would in fact constitute rebuttal evidence. Rebuttal evidence is that introduced "to refute a particular piece of evidence which has been adduced by the defence."[28] This is precisely how the Prosecution itself characterises the additional evidence which it seeks to submit.[29] The Prosecution's decision to frame its motion as a request for an extension of time therefore appears to be a deliberate attempt to circumvent the onerous requirements of presenting rebuttal evidence at the ICC.

25. While the Rome Statute framework does not expressly create a stage of the proceedings in which rebuttal evidence may be called, its provisions have been interpreted allowing the presentation of rebuttal evidence in extremely limited circumstances.[30] Its presentation has been characterised as "exceptional", with Trial Chamber I in *Lubanga* holding that: [31]

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[28] *Prosecutor v. Brima et al.*, Trial Chamber, Decision on Confidential Motion to Call Evidence in Rebuttal, 14 November 2006, SCSL-2004-16-A, para. 32.
[29] ICC-01/05-01/08-2910, paras. 5, 8.
[30] *Prosecutor v. Lubanga*, Trial Chamber, Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, ICC-01/04-01/06-2727, 28 April 2011, para. 37.
[31] *Ibid.*, para. 43.

> Calling rebuttal evidence is likely to be **an exceptional event**; it will be necessary for the prosecution to demonstrate, first, that an issue of significance has arisen *ex improviso*, second, that the evidence on rebuttal satisfies the admissibility criteria; and, third, this step will not undermine the accused's rights, in particular under Article 67 of the Statute.

26. The *Lubanga* Trial Chamber also recognised that on the question of rebuttal evidence "the *ad hoc* tribunals are, broadly speaking, in a comparable position to the Court," and their jurisprudence is therefore relevant in this context.[32] The *Lubanga* Chamber "broadly agreed with the general approach" adopted by the ICTY and ICTR,[33] and explained that:[34]

> The *ad hoc* tribunals have considered the admission of rebuttal evidence on a number of occasions. Both the ICTY and the ICTR have decided that the Chamber has a wide discretion to limit or preclude the presentation of rebuttal evidence in order to ensure that the trial proceeds expeditiously, and to avoid unfairness and unnecessary delays. The tribunals have determined that the proposed rebuttal evidence must relate to a significant issue that arises directly out of defence evidence that has been introduced, which could not reasonably have been anticipated. However, **the prosecution cannot call rebuttal evidence merely because its case has been contradicted by other evidence or in order to reinforce other evidence that has already been called. Indeed, the tribunals have determined that the prosecution is under a duty to adduce all the evidence necessary to prove the guilt of the accused and thereafter it should close its case**.

27. Significantly, the *ad hoc* Tribunals have held that "when the proposed rebuttal evidence challenges the credibility of a witness, or other collateral matters, the Chamber should exclude it in rebuttal."[35] This is in line with the requirement

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[32] *Ibid.*, para. 41.
[33] *Ibid.*, para. 43.
[34] *Ibid.*, para. 42.
[35] *Prosecutor v. Ntagerura et al*, Trial Chamber, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence, 21 May 2003, ICTR-99-46-T, para. 33. See also *Prosecutor v. Kordic and Cerkez,* Trial Transcript, 18 October 2000, http://ictytranscripts.org/trials/kordic_cerkez/001018ed.htm; *Prosecutor v. Nahimana et al.,* Trial Chamber, Decision of 9 May on the Prosecutor's Application for Rebuttal Witnesses as Corrected According to Order of 13 May 2003, 13 May 2003, ICTR-99-52-T**,** para. 51;

that there must be judicial finality: the mere possibility that a party could obtain evidence which might impeach a witness is subordinate to an accused's right to an expeditious trial, and to receive a judicial resolution of the serious allegations that he has faced, within a reasonable time frame.

28. Although the Prosecution's submissions as to the relevance of the proposed new evidence are extremely vague, it does assert that the alleged evidence is relevant to the credibility of Defence evidence, and that it affects the testimony of 14 Defence witnesses.[36] Accordingly this is precisely the kind of evidence which should be excluded as rebuttal evidence. Proposed rebuttal evidence must have "significant probative value to the determination of an issue central to the determination of the guilt or innocence of the Accused."[37] The extremely limited submissions made by the Prosecution demonstrate that this is not the case.

29. Even if the proposed additional evidence could properly be characterised as rebuttal evidence, the late stage of the proceedings mitigates against its admission. In determining the propriety of granting leave to call rebuttal evidence, "the Chamber enjoys wide discretion to limit or preclude the presentation of rebuttal in order to insure that the trial proceeds expeditiously, without unfairness and needless consumption of time."[38] In considering an application for rebuttal, the Trial Chamber in *Kordić & Čerkez* noted:[39]

> The case has taken 222 days, and 3.213 exhibits have been filed. As a result, a great many issues have been raised, some much more

Prosecutor v. Ndindiliyimana et al., Trial Chamber, Decision on Prosecution Motion to Call Rebuttal Evidence, 20 February 2009, ICTR-00-56-T , para. 8.

[36] ICC-01/05-01/08-2910, paras. 5, 8.

[37] *Prosecutor v. Ntagerura et al.*, Trial Chamber, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence, 21 May 2003, ICTR-99-46-T, para. 34.

[38] *Ibid.*, para. 31.

[39] *Prosecutor v. Kordzic and Cerkez*, Trial Transcript, 18 October 2000, http://ictytranscripts.org/trials/kordic_cerkez/001018ed.htm

> significant and important than others. Against this background, the Trial Chamber has to bear in mind the duty under the statute to ensure a fair and expeditious trial. In our view, to allow an extensive rebuttal case and evidence would be to contravene that duty

30. The same reasoning is equally applicable to the present proceedings, which has spanned over three years, with 583 exhibits having been admitted,[40] and 74 witnesses having now been heard by the Chamber.

(b) The Prosecution has failed to submit sufficient information to either satisfy its burden of demonstrating the admissibility of the evidence, or to enable the Defence to make informed submissions on this issue

31. It is self-evident that applications for the admission of incriminating evidence against the accused should be litigated in a fully *inter partes* manner. The Prosecution Request is nonetheless completely devoid of the minimum information required to substantiate an application for admission of evidence, in particular, "the three-part test of relevance, probative value and potential prejudice".[41] As the party seeking to admit this evidence, the Prosecution bears the burden of demonstrating that this three-part test has been met for each of the evidential items.[42]

32. Most importantly, although the Prosecution has provided a bare bones description of the evidence, it has not disclosed the evidence itself – which should be the *sine qua non* of any application for the admission of evidence.

33. Although the Prosecution has averred that the evidence concerns specific Defence witnesses,[43] it has failed to indicate the specific identity of these Defence witnesses. It has also failed to demonstrate the linkage between this evidence and

[40] ICC-01/05-01/08-2921, para. 1.
[41] ICC-01/05-01/08-2793, para.11.
[42] ICC-01/05-01/08-2012-Red, para. 17.
[43] Request, para. 3.

the charges against Mr. Bemba. As such, the Request fails to satisfy the requirement under Article 69(4) that the tendering party must demonstrate the relevance of the evidence in question to the charges against the accused.

34. The Prosecution has also failed to specify any information concerning the source of the evidence, the date it was collected, who collected the evidence in question and the methodology used to do so, and chain of custody. It is therefore impossible to verify the probative value of the evidence in such an information vacuum. Indeed there is currently insufficient information for the Chamber to conclude that the material which the Prosecution proposes to submit ("one audio recording, one report and a financial chart") is even capable of amounting to evidence at all within the meaning of the Rome Statute and the Rules of Procedure and Evidence. There is no apparent or alleged basis for attribution of collocutors in relation to the audio recording, and no basis for assuming provenance of the information used in compiling the "report" or the "chart".

35. Finally, the Prosecution bears the burden of demonstrating that the probative value of the evidence is not outweighed by the prejudicial impact on the rights of the accused or a fair and impartial trial. Article 69(7) elaborates on this element, and sets out mandatory bases for excluding evidence, which has been obtained in violation of the Statute or internationally recognized human rights. In the absence of any information concerning the provenance of the evidence, or the legal basis governing its collection, the Prosecution has clearly failed to establish that the admission of the evidence would not cause any prejudice to the rights of the Defence or the fairness of the proceedings, or that it was collected in accordance with the legal requirements of the Statute and internationally recognized human rights.

36. The deficiencies in the Request are exacerbated by the possibility that the evidence may have been directly or indirectly obtained in violation of the strict

protections afforded by the Statute and Rules to legal professional privilege. In the absence of any information on this point, the Defence has been completely deprived of the ability to challenge this issue, which again underscores the Prosecution's failure to substantiate its Request with the details required to adjudicate it in a fully adversarial and fair manner.

(c) The admission of the proposed material would preclude any expeditious conclusion of Mr. Bemba's case

37. As noted above, the Prosecution seeks to "submit one audio recording, one report, and one financial chart".[44] The Prosecution Request makes plain that this material is the product of its investigations in case ICC-01/05-01/13 ("Article 70 case").[45] The Prosecution characterises this additional evidence as "limited in scope" and asserts that it "does not intend to submit the total product of its Article 70 investigation".[46]

38. However, as the Prosecution itself accepts, and the jurisprudence of the ICC requires,[47] the Defence would be entitled to carry out further investigations and call additional evidence in response. The Prosecution asserts that "any prejudice to the Accused can be remedied by providing additional and limited time to respond to the additional evidence."[48] While the vagueness of the Prosecution Request precludes full submissions at this stage, the Defence anticipates that the submission of the proposed evidence would entail the following procedural steps: litigation as to the legality of the accessing and seizing of privileged and/or confidential material from the five suspects in the Article 70 case; litigation as to the disclosure of the

[44] ICC-01/05-01/08-2910, para. 8.
[45] See, for example, ICC-01/05-01/08-2910, para. 2.
[46] ICC-01/05-01/08-2910, para. 8.
[47] *Prosecutor v. Lubanga*, Trial Transcript, ICC-01/04-01/06-T-352-Red, 18 April 2011, pages 20-21.
[48] ICC-1/05-01/08-2910, para. 5.

entire Article 70 case file; a request from the Defence to seek to recall the 14 witnesses whose testimony is allegedly affected by the additional evidence; and a request from the Defence to present the evidence of the five suspects in the Article 70 case as *viva voce* witnesses in the present proceedings.

39. Requiring the five suspects in the Article 70 case to reveal their defence strategy in the present proceedings would obviously put them at an undeniable disadvantage in the Article 70 case, giving rise to real and manifest prejudice should they testify. *A fortiori,* the position of Mr Bemba, who has chosen not to give evidence in his own defence, and who now cannot within the context of this trial explain discrete matters arising from the disclosure of the instant material without exposing himself to cross-examination about the whole subject matter of the Document Containing the Charges in the present case. As such, the Defence anticipates that it would accordingly seek a stay of the present proceedings until the Article 70 case was completed and a first instance judgment, and any judgment on appeal were rendered. The anticipated timeframe for the Article 70 case is unknown, but publicly available information indicates that the Prosecution is not required to file a Document Containing the Charges until 18 March 2014,[49] and the briefing period for subsequent written filings does not conclude until 2 May 2014.[50] The date for the confirmation hearing has not been set. A refusal of a stay of proceedings would necessarily lead to two Trial Chambers of the International Criminal Court deciding on the legality, reliability and admissibility of exactly the same evidence, and any divergence on the findings as between the two Trial Chambers may give rise to further litigation in both cases.

40. In addition, as the Prosecution has itself asserted in a Status Conference of 28 November 2013, any introduction of this material would put those currently

[49] ICC-01/05-01/13-T-1-ENG, 27-11-2013, page 15, line 8
[50] ICC-01/05-01/13-T-1-ENG, 27-11-2013, page 15, line 14

representing Mr. Bemba in a difficult professional position.[51] Accordingly, the likelihood that the current team would need to withdraw cannot be discounted. The time involved in appointing a new legal team, and the time that this new team would require to read-in to the current proceedings and become familiar with the case file should also therefore be taken into account. In short, the delay in the present proceedings should be measured in years, rather than weeks or months.

41. Such a delay is wholly inconsistent with Mr. Bemba's right to have his trial concluded in an expeditious manner. Incarcerated since March 2008, the presentation of evidence in the case against Mr. Bemba has already taken over three years. Trial Chamber II in the *Katanga* case, when considering an application for the late submission of newly inculpatory material, held that it could allow for its late submission if: [52]

> it deems this necessary for the determination of the truth and as long as this does not jeopardise the Defence's right to have adequate time in order to prepare. The Chamber will thus have to weigh the interest in having the additional information against the need for the Defence to usefully prepare its response to it. **If the length of time and resources that are reasonably required by the Defence to prepare a meaningful response to the new items of evidence are disproportionate to the limited interest of the Chamber in having the additional item of evidence discussed at trial, the item may still be rejected…**
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> **To assist the Chamber in assessing the impact of the late submission of new incriminating evidence on the Defence, the Prosecution must explain how the new evidence relates to its overall evidentiary case and the manner in which it is proposed it will be entered into evidence during the trial**.

[51] ICC-01/05-01/08-T-359-ENG, pages. 7-8.

[52] *Prosecutor v. Katanga & Ngudjolo*, Trial Chamber, Corrigendum Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456), ICC-01/04-01/07-1515-Corr, 9 October 2009, paras. 26, 30.

42. On this point, it is worth recalling that the timing of the present application is the result of a deliberate choice on the part of the Prosecution. While the Defence has no way of knowing for how long this evidence has been in the possession of the Prosecution, it appears that the Prosecution [REDACTED].[53] The Prosecution itself acknowledges that it chose not to introduce the material in these proceedings in a more timely fashion, electing instead to prioritise its "ongoing investigations" in a contempt case.[54] It is submitted that this gamble should not be rewarded, particularly given the lengths to which the Chamber, parties and participants have gone to conclude the present proceedings in a timely manner.

43. The Prosecution's proposed strategy of submitting only a self-serving fraction of its Article 70 investigations into the present case and giving the Defence a "limited" time to respond is not only procedurally illogical, at risk of putting itself in breach of its disclosure obligations, but is inconsistent with Mr. Bemba's right to a fair and expeditious trial. Any submission of the proposed evidence gives rise to the right of the accused to vigorously defend against this new material in the same manner as any other presented during the proceedings. Given the apparent complexity of the Article 70 proceedings and its interaction with the present case, any response to the admission of the proposed new evidence would be impossible to reconcile with the expeditious conclusion of the present trial.

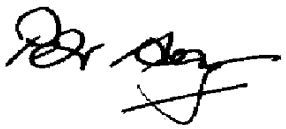
D. REQUESTED RELIEF

44. Given the above, the Defence respectfully requests that the Chamber

REJECT the Prosecution's Application to Submit Additional Evidence

[53] [REDACTED]
[54] ICC-01/05-01/08-2910, para. 3.

The whole respectfully submitted.



Peter Haynes QC

Counsel for Mr. Jean-Pierre Bemba

Done this day, 15 January 2014

The Hague, The Netherlands