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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 with Public Annex A, Confidential Annex B, Public Redacted version of
Annex B and Confidential Ex Parte (Prosecution and Defence only) Annex C*

Defence Addendum to Response for admission of new Article 70 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:

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

A. INTRODUCTION

1. The Defence for Mr. Jean Pierre Bemba Gombo respectfully requests the permission of the Trial Chamber to file a discrete Addendum to its “Response to the Prosecution’s application to submit additional evidence” (“Response”)¹ on the basis of critical information and developments, which the Defence was not aware of at the time it submitted its Response.

2. The Defence is still not privy to key information concerning the Article 70 investigations, and the Prosecution has refused to disclose any information concerning the reliability or credibility of the Article 70 evidence, which the Prosecution has sought to admit into the current proceedings (“the Article 70 evidence”).²

3. The Defence has nonetheless recently acquired information which demonstrates that the Article 70 evidence is lacking in reliability and relevance, and that the prejudicial impact of its admission would outweigh its (extremely limited) probative value.

4. In particular, the Prosecution has failed to act as an independent Minister of Justice, and has withheld from the Trial Chamber key information concerning the credibility of the Article 70 evidence.

5. The appropriate remedy for this conduct is to refuse to admit the Article 70 evidence, and to remain seized of the overarching issue concerning the Prosecution’s conduct in this matter, and the impact which has had on the overall credibility of the Prosecution case, and Mr. Bemba’s right to a fair trial.

¹ ICC-01/05-01/08-2937-Red.

² Email from Jean-Jacques Badibanga, 10 March 2014, 11:23 am (Annex A).

B. PROCEDURAL HISTORY

6. On 29 November 2013, the Prosecution submitted an application to admit evidence, which it had collected as part of its Article 70 investigations against the Defence.³

7. The Prosecution did not disclose the Article 70 evidence contemporaneously with its application, nor had the Defence received the Article 70 evidence prior to the expiration of the deadline for the Response.

8. On 8 January 2014, the Defence for Mr. Mangenda, the Accused's former case manager, filed its "Requête de mise en liberté" in the Article 70 proceedings, in which it noted that the Prosecution's allegations, in particular, those founded on Western Union transfers could be refuted by information concerning Mr. Bemba's detention unit account.⁴

9. Notwithstanding the clear relevance of this assertion to the credibility of the Article 70 evidence, the Prosecution did not disclose this information to either the Trial Chamber or the Defence of Mr Bemba in the main case. Moreover, the Prosecution resisted Mr Mangenda's application for disclosure of this material by the Registry. His application was subsequently denied by the Single Judge.⁵

10. On the contrary, in its public request to file a reply in relation to the admission of the Article 70 evidence, the Prosecution requested leave to tender submissions as to:

³ ICC-01/05-01/08-2910.

⁴ ICC-01/05-01/13-71-tENG, "it must be recalled or pointed out that the sums received by the Applicant in his capacity as Case Manager were on every occasion transferred to the detention centre administration in Scheveningen for payment to Mr Jean-Pierre Bemba's account to cover his needs in prison. The Prosecutor, who is, nonetheless duty-bound to investigate incriminating and exonerating circumstances equally, therefore failed to request that the detention centre administration list the amounts deposited by the Applicant from 2011 until 2013.", para.15.

⁵ ICC-01/05-01/13-73.

“Whether evidence of witness bribery and coaching in this case is rebuttal evidence and/ or relevant evidence necessary for the determination of the truth; [...] Whether the Accused is prejudiced by the disclosure of additional evidence of witness bribery and coaching when he and other members of his Defence team consciously and knowingly based their case on false evidence.”⁶

11. On 12 February 2014, more than a month after the issue became live in the Article 70 case, the Prosecution filed a request for judicial assistance to obtain information from the Registry concerning Mr. Bemba’s detention accounts. In so doing, the Prosecution submitted that:

“The information sought is directly relevant to and probative of material issues in the case. The Prosecution’s Application alleges that, “the Western Union records show that Kilolo and Mangenda received large payments on dates coinciding with the dates of testimony of several witnesses in The Hague. In turn, payments to Defence witnesses coincided with the period immediately preceding and/or following their testimonies.”

The Prosecution further alleged that Mangenda received at least USD 30,774.66 from Bemba’s associates in the period February 2011– April 2013. To the contrary, Mangenda avers that any money he received was «à chaque fois transféré[s] à l’administration pénitentiaire à Scheveningen, aux fins d’être versés au compte de Monsieur Jean-Pierre BEMBA, afin de subvenir à ses besoins en prison».”⁷

12. On 5 March 2014, the Prosecution filed a request to adjourn the Article 70 confirmation hearings by four months.⁸ The Prosecution justified the adjournment by averring that,

“[a]llowing the Prosecution a reasonable opportunity to review the seized material benefits the proceedings as a whole — it is in the interests of justice and promotes not only the fairness and expeditious conduct of the proceedings, but

⁶ ICC-01/05-01/08-2940, para. 3.

⁷ ICC-01/05-01/13-179, para. 5.

⁸ ICC-01/05-01/13-234-Red.

advances the truth-seeking function of the Court and the Prosecution's corresponding responsibility to establish it. Bemba's Detention Centre account record recently provided by the Registry is a case in point. Although the record does not undercut the Prosecution's case against Mangenda, they underscore the need to proceed in this case circumspectly."⁹

13. Again, the Prosecution neither notified the Trial Chamber nor the Defence for Mr. Bemba of these developments, nor did it seek to qualify or amend its previous request to admit the Article 70 evidence.

14. On 10 March 2014, the Prosecution wrote to the Defence to inform them that the "Office of the Prosecutor has assisted to the extent possible in responding to your series of letters sent since January 2014. If you would like to pursue these matters further, we suggest that you make an official request through the Chamber with justification, to which we will respond".¹⁰ Through a series of filings before the Trial Chamber, the Defence has sought further orders of disclosure and/or injunctive relief.¹¹ Nonetheless, the Defence submits that the developing situation demands current submissions from the parties directed to the probative value of the material which the prosecution seeks to admit.

C. SUBMISSIONS

15. Article 54(1) of the Statute enjoins the Prosecutor to act as an independent Minister of Justice, and to that end, to investigate all incriminating and exculpatory circumstances in equal measure. In short, the Prosecution's duty is to disclose all material relevant to the credibility and reliability of its evidence, and to advance a case to the Chamber which is based upon a realistic, rather than a fanciful, assessment of the underlying evidence.

⁹ ICC-01/05-01/13-234-Red, para. 41.

¹⁰ Annex A.

¹¹ ICC-01/05-01/08-2991-Red; ICC-01/05-01/08-2963 and ICC-01/05-01/08-2963-Anx A; ICC-01/05-01/08-2971-Red; ICC-01/05-01/08-2983-Red; ICC-01/05-01/08-2991-Red; ICC-01/05-01/08-3004.

16. In the *Mbarushimana* case, the Pre-Trial Chamber found that the probative value of evidence collected by the Prosecution was “significantly weakened” in the face of indicia that the Prosecution had failed to conduct its investigations with the requisite level of impartiality.¹²

17. In the *Kenyatta* case, the Trial Chamber recalled the Prosecution’s duty to disclose exculpatory information, and found that the exclusion of Prosecution evidence could be an appropriate remedy if the Prosecution had failed to comply with this duty.¹³

18. The Chamber further referred to the Prosecutor’s duty to establish the truth by conducting both incriminating and exculpatory investigations, and to present “a complete evidentiary record”.¹⁴

19. In a separate concurring opinion, Judge Van den Wyngaert deprecated the “Prosecution’s negligent attitude towards verifying the trustworthiness of its evidence” and “towards verifying the reliability of central evidence in the Prosecution’s case”,¹⁵ and specified that “thorough and comprehensive due diligence with regard to the reliability of the available evidence is an ongoing obligation of the Prosecution under article 54(1)(a), which is as important as the collection of that evidence itself”.¹⁶

20. Irrespective of whether the Prosecution was negligent in failing to request access to Mr. Bemba’s detention unit records until mid-February 2014, the Prosecution clearly acted in a manner which was inimical to its duties as an independent Minister of Justice by failing to alert the Trial Chamber of key

¹² ICC-01/04-01/10-465-Red, para. 51

¹³ ICC-01/09-02/11-728, paras. 89-90.

¹⁴ ICC-01/09-02/11-728, para. 119.

¹⁵ ICC-01/09-02/11-728-Anx2, para. 4.

¹⁶ ICC-01/09-02/11-728-Anx2, para. 4.

developments in the Article 70 case, which undermined the reliability of its Article 70 evidence.

21. As set out above, the Prosecution explicitly recognised in the context of the Article 70 case that the issue of whether the former Case Manager transferred money to the detention unit account of Mr. Bemba was directly relevant to the allegations in that case, and at the very least, triggered a need for “circumspection”.

22. However, the Prosecution not only failed either to disclose such information to the Defence or to qualify its request to admit the Article 70 evidence in these proceedings, the Prosecution continued to rely on the Article 70 evidence and related allegations (including those against Mr. Mangenda) in order to denigrate the credibility and professionalism of the Defence, and thereby impugn the credibility and reliability of the Defence case as a whole.

23. At the same time, the Prosecution has, without any explanation or justification, refused to disclose information or evidence concerning the credibility or reliability of its Article 70 evidence. This in turn, has impeded the ability of the Defence to test or assess the reliability and credibility of the Article 70 evidence.¹⁷

24. The detention unit accounts of Mr. Bemba demonstrate that the Prosecution ‘theory’ concerning the Western Union transfers to Mr. Mangenda is fatally flawed: each Western Union transfer corresponds precisely to a transfer or transfers of funds to Mr. Bemba in the detention unit. The records, moreover, demonstrate that funds delivered to Mr Bemba were dispersed and accounted for by purchases through the Detention Unit of food and other sundries. The Defence agrees that the Detention Unit accounts do not “undercut” the Prosecution case that funds

¹⁷ All relevant correspondence between the Defence and the Prosecution on this matter can be found in Annex B.

transferred to Mr Mangenda were for the purposes of suborning false testimony. They rather leave it “dead in the water”.¹⁸

25. The Defence submits that the Prosecution’s failure to investigate such an obvious possibility in this particular instance, leads to an irresistible inference that the Article 70 case as a whole is flawed by other key omissions, and/or failures to investigate obvious and potentially innocent or exculpatory explanations.

26. Had the Prosecution tendered all information, which allegedly impugns the credibility of Defence witnesses, in an *inter partes* manner at the time when the witnesses in question testified, then the Defence or the witness in question would have been in a position to explain and clarify any misunderstandings in a timely manner.

27. The prejudice caused by the Prosecution’s deliberate strategy of eschewing adversarial proceedings in order to pursue a “cloak and dagger” investigation is obvious. This prejudice continues to be exacerbated by the Prosecution’s deliberate refusal to disclose information, which is relevant to the Article 70 evidence.

28. The current situation is on a par with the circumstances in the ICTR *Bizimungu* case, in which the Trial Chamber found that it was “distressing” that a Prosecution senior trial attorney appearing in two cases would “advance contradictory claims in front of two Trial Chambers”,¹⁹ and that the failure of the Prosecution to disclose exculpatory material had deprived the Defence of the ability to put relevant information to their witnesses during their testimony.²⁰

¹⁸ Mr Bemba’s UNDU account summary reflecting the transactions can be found in Annex C.

¹⁹ *Prosecutor v. Casimir Bizimungu et al.*, Trial Judgment 30 September 2000, Case No. ICTR-99-50-T, para. 153

²⁰ *Ibid.*, para. 166.

29. In light of the advanced nature of the proceedings, the Chamber found that it would be incompatible with the defendant's right to a speedy trial to recall witnesses, nor would the admission of exculpatory evidence adequately remedy the prejudice.²¹ The Chamber therefore found that the most appropriate remedy would be to draw inferences in favour of the Defence.²²

30. Similarly, in light of the very public and prevalent attacks on the credibility of the Defence case, neither the exclusion of the Article 70 case nor the admission of Mr. Bemba's detention unit records can adequately compensate for the fact that the Prosecution advanced a partial and poorly investigated theory based on the Western Union transfers in order to:

- i. conduct an *ex parte* smear campaign against Defence witnesses;
- ii. obtain access to highly sensitive Defence communications concerning its strategy and investigations; and
- iii. contact Defence witnesses without the knowledge of the Defence.

31. The Defence is in the process of seeking the intervention of the Trial Chamber to obtain access to further relevant information within the possession of the Prosecution, which the Prosecution has refused to disclose.

32. It is highly probable that once more information is disclosed concerning the manner in which the Prosecution collected the Article 70 evidence, that there will be other strong grounds to contest the admissibility, reliability and probative value of the evidence, or to raise grounds for exclusion under Article 69(7) of the Statute.

33. Since the burden of meeting the criteria for admissibility falls on the Prosecution, the Prosecution should have ensured that the Defence was in

²¹ *Ibid.*, paras. 172-173.

²² *Ibid.*, para. 174.

possession of all information which could be relevant to its application, at the time the Prosecution introduced its application.

34. The Chamber cannot but draw adverse inference in relation to the Prosecution's failure to disclose either the Article 70 evidence itself at the time of the Prosecution application, or any information concerning its reliability or provenance subsequently.

35. If the Chamber is not minded to exclude the Article 70 evidence due to the clear indicia of prejudice and unreliability at this juncture, then at the very least, the Trial Chamber should suspend its decision on its admission and accord the Defence a full and fair opportunity to continue to raise any matters concerning the admissibility of the Article 70 evidence, as and when further information comes to light. Moreover, the Chamber should reinforce and/or order the Prosecution to respect its ongoing disclosure obligations.

36. Through no lack of diligence on its part, the Defence is currently unable fully to substantiate its submissions concerning the nature and degree of the prejudice it has suffered, and thus what measures, apart from and in addition to the exclusion of the Article 70 evidence, would be required to remedy this prejudice.

D. RELIEF SOUGHT

37. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Honourable Trial Chamber to:

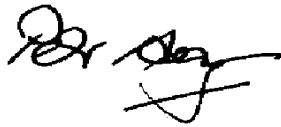
ALLOW the Defence to submit an Addendum to its "Response to the Prosecution's application to submit additional evidence";

ALLOW the Defence to make further submissions upon the admissibility of the Prosecutions “Article 70 evidence” until 31 May 2014²³ or such date as the Single Judge determines that the Prosecution’s disclosure obligations in that case are concluded, whichever is the later; and in any event

EXCLUDE the Prosecution’s Article 70 evidence; and

REMAIN SEIZED of the overarching issue concerning the Prosecution’s conduct in this matter, and the impact which has had on the overall credibility of the Prosecution case, and Mr. Bemba’s right to a fair trial.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

14 March 2014

²³ ICC-01/05-01/13-255.