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

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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 Redacted Annex A, Public Annex B, Public Redacted Annex C,
Public Redacted Annex D, Public Annex E, Public Annex F, Public Redacted Annex G
and Public Annex H*

Public Redacted Version of 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:

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 Other
Section**

A. INTRODUCTION

1. The Prosecution's investigative powers are concomitant with its disclosure duties.¹

2. The role of the Prosecution is not simply to advance its own case, but to assist the Court to determine the truth by searching for all information, which might be relevant to the truth.

3. The presumption of full disclosure² thus places a heavy onus on the Prosecution to disclose all relevant information, even that which might be damaging to the Prosecution case, undermine its theory, or eliminate the Prosecution's strategic advantage.

4. The Prosecution cannot, therefore, contact and interview Defence witnesses or request information concerning the Defence, without being compelled to disclose both the fruits of these investigations to the Defence, and any information which might be relevant to the circumstances under which the investigations were conducted.

5. In the present case, the Prosecution not only failed to disclose information which is clearly material to the preparation of the Defence (and potentially exculpatory), it obstructed the ability of the Defence to obtain such information by refusing to engage in the disclosure process itself.

6. It is therefore both necessary and appropriate for the Trial Chamber to intervene by:

- i. Ordering the Prosecution to disclose the information requested by the Defence ("the Requested Information"); and

¹ ICC-01/04-01/07-621, para. 39.

² ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/07-475, para. 70.

- ii. Remaining seized of the need to sanction the Prosecution by either excluding any incriminating material or charges to which the Requested Information relates, or drawing inferences either against the Prosecution or in favour of the Defence, as appropriate.

B. PROCEDURAL HISTORY

7. [REDACTED].³

8. According to recently reclassified filings, the Prosecution informed the Single Judge that its Article 70 investigations were triggered by information it received from an anonymous informant, who⁴

provided reliable information on the identity and travel itineraries of one Defence witness –[REDACTED] (D04-52) – which the Prosecution was able to confirm independently through subsequent news reports, [REDACTED] and [REDACTED], and the Defence disclosure on 13 July 2012.

9. The Prosecution also confirmed that it exchanged numerous emails with this “anonymous informant” in order to obtain further information, “including the basis of the informant’s knowledge, the details of his information, and whether the information could be corroborated by other independent sources”.⁵ In the same filing, the Prosecution stated that:⁶

On 12 October 2012, the Prosecution met with [REDACTED], a person whom the Prosecution previously interviewed during the investigation stage of the instant case. The Prosecution [REDACTED] in order to gather information for questioning of Defence witnesses who purported to be in CAR during the 2002-2003 period. [REDACTED] was going to be called as a Defence witness. [REDACTED] told him that [REDACTED] facilitated contact with a person from The Hague who promised him relocation to Europe if he

³ [REDACTED].

⁴ ICC-01/05-44-Red, para. 10.

⁵ ICC-01/05-44-Red, para. 10.

⁶ ICC-01/05-44-Red, para. 11.

testified that he was [REDACTED]. [REDACTED] stated that in fact [REDACTED] had [REDACTED].

10. On the basis of these submissions, the Prosecution requested the Single Judge to vary the witness protocol issued by the Trial Chamber in order to contact Defence witnesses in the main case.⁷

11. [REDACTED].⁸

12. On 29 November 2013, the Prosecution filed an application to “submit one audio recording, one report, and one financial chart”.⁹ The Prosecution asserted that this material “affects the testimony of fourteen (14) Defence witnesses.”¹⁰ The Prosecution submitted that the proffered evidence demonstrated that the Defence “paid money to a number of Defence witnesses”, and that this impacted on the witnesses’ credibility.¹¹

13. On 17 February 2014, the Defence requested the Prosecution to disclose, *inter alia*:

- a. Whether the Prosecution had ever submitted any requests for assistance to the DRC authorities in connection with matters pertaining to the Defence case;
- b. Copies of any correspondence, minutes or *procès verbaux* related to such requests; and
- c. Whether, independent of such requests, the ICC Prosecution obtained any information in its broadest sense from the DRC authorities, which could have been obtained by monitoring Defence witnesses, persons assisting the Defence, or Defence team members.¹²

⁷ ICC-01/05-44-Red.

⁸ [REDACTED].

⁹ ICC-01/05-01/08-2910, para. 8.

¹⁰ ICC-01/05-01/08-2910, para. 8.

¹¹ ICC-01/05-01/08-2948-Conf, para. 9.

¹² Annex A - Letter from Mr. Peter Haynes QC to Mr. Jean-Jacques Badibanga, 17 February 2014.

14. In a 20 February 2014 letter to the Prosecution, the Defence cited to the Prosecution submissions concerning information, which it had received from the “anonymous informant”, and expressed its concern that it appeared from this submission that the anonymous informant was in possession of information concerning Defence witnesses.¹³

15. The Defence therefore requested the Prosecution to confirm firstly, whether it had conducted any inquiries in relation to how the anonymous informant may have come to be in possession of information concerning Defence witnesses, and secondly, whether the Prosecution had undertaken any follow-up measures in order to protect the integrity of the proceedings, for example, alerting either the Chamber or the Victims and Witnesses Unit to the fact that a person outside of the Defence appeared to be in possession of information concerning the Defence. The Defence further observed that the Prosecution submissions to the Single Judge appeared to indicate that the Prosecution had either interviewed a Defence witness on 12 October 2012, or a person who was in possession of information concerning potential Defence witnesses. The Defence therefore requested that the Prosecution confirm whether the person in question was a Defence witness, and if not, how the person came to be in possession of information concerning actual or potential Defence witnesses.

16. In its response to these letters, the Prosecution indicated that “[t]he Prosecution did not receive any assistance or information from the DRC authorities pertaining to matters of the Defence case in relation to the Article 70 investigation.”¹⁴ The Prosecution also averred that “the anonymous informant never provided us with any ‘confidential Defence matters’ [...] he did not give us any witness names. As a precaution, we never provided the informant with information of the identities of Defence witnesses.”

¹³ Annex B - Letter from Mr. Peter Haynes QC to Mr. Jean-Jacques Badibanga, 20 February 2014.

¹⁴ Annex C - Letter from Mr. Jean-Jacques Badibanga to Peter Haynes QC, 21 February 2014.

17. The Prosecution did not respond to the Defence's query as to whether it interviewed an actual or potential Defence witness on 12 October 2012 or a person who was in possession of information concerning actual or potential Defence witnesses.

18. In a follow up letter sent on 24 February 2014, the Defence sought further clarification concerning both the anonymous informant, and the existence of any requests for assistance from the DRC.¹⁵ In particular, the Defence underlined that in its letter of 17 February 2014, the Defence had requested the Prosecution to disclose any requests for assistance from the DRC authorities concerning the Defence case, and that as such, the Prosecution had failed to address this request.

19. The Defence further noted that, in its submissions to Judge Tarfusser, the Prosecution had stated that the anonymous informant had "provided reliable information **on the identity** and the travel itineraries of one Defence witness – [REDACTED] (D04-52)".¹⁶ The Defence therefore requested the Prosecution to address the inconsistency between its submissions to Judge Tarfusser, and its avowal to the Defence that the anonymous informant "did not give [the OTP] any witness names".

20. On 25 February 2014, the Defence wrote to the Prosecution firstly, to note that the Prosecution had acknowledged that it had contacted Defence witnesses in this case, and secondly, to request the Prosecution to disclose:

- i. The identity of the witnesses contacted and the date(s) on which this contact took place;
- ii. The existence and amount of any benefits and allowances paid by the Prosecution to these witnesses, or any particular requests for assistance which were acceded to by the Prosecution;

¹⁵ Annex D - Letter from Mr. Peter Haynes QC to Mr. Jean-Jacques Badibanga, 24 February 2014.

¹⁶ ICC-01/05-44-Red, para. 10.

- iii. Whether any of these witnesses requested any benefits, allowances or particular forms of assistance which were not granted by the Prosecution – and the reasons for the refusal; and
- iv. Whether any of these witnesses had been relocated by the ICC.¹⁷

21. On 3 March 2014, the Prosecution responded that:

The information you are asking for in your letter of 25 February 2014 is pertinent to the Article 70 case. I understood that you filed a motion addressing contact with Defence witnesses to which we responded. The Trial Chamber is still to rule on it. If you have additional requests related to the same matter, I invite you to address the Trial Chamber III via a formal filing to which we will respond.”¹⁸

22. The Defence sent a follow up letter on 5 March 2014,¹⁹ in which it further requested the Prosecution to disclose, in connection with the Defence witnesses contacted by the Prosecution:

- i. Whether the Prosecution informed any of these witnesses as to whether they were a suspect, and followed the procedure under Article 55(2) of the Statute;
- ii. Whether the witnesses were represented by Counsel during these interviews;
- iii. Whether any of these witnesses were interviewed whilst under arrest or held under detention in its broadest sense (including meeting in a police station or in the presence of domestic law enforcement officers);
- iv. Whether any domestic officials were present during the interview, or were informed either beforehand or afterwards of the interview; and
- v. Whether the identity documents of these witnesses were confiscated (temporarily or permanently) by domestic authorities or whether

¹⁷ Annex E - Letter from Mr. Peter Haynes QC to Mr. Jean-Jacques Badibanga, 25 February 2014.

¹⁸ Annex F - Letter from Mr. Jean-Jacques Badibanga to Peter Haynes QC, 3 March 2014.

¹⁹ Annex G - Letter from Mr. Peter Haynes QC to Mr. Jean-Jacques Badibanga, 5 March 2014.

any measures of restraint (in its broadest sense) were employed by domestic authorities.

23. The Defence further contested the Prosecution's refusal to effect disclosure on the sole ground that the requested information was "relevant to the Article 70 case", and put the Prosecution on notice that the Prosecution's refusal to disclose the request information had created a prejudice in the main case, which the Prosecution was obliged to remedy immediately.

24. In a filing dated 6 March 2014, the Prosecution claimed that information derived or related to its contact with Defence witnesses was "either incriminating or evidence intended to be used by the Prosecution, should it seek to do so. Nevertheless, the Prosecution is ready to disclose this material, should the Chamber decide otherwise".²⁰

25. The Prosecution further stated that "[t]he disclosure of any witness related Article 70 material is intrinsically linked to the Chamber's decision on the relevance of any such evidence for the current trial proceedings".²¹

26. On 10 March 2014, the Prosecution responded to 24 February and 5 March requests by asserting as follows:

"We are of the opinion that there is no basis for us to provide you with information related to the procedure applied to interviews of witnesses regarding the Article 70 investigation, or any Request for Assistance to the DRC authorities.

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."²²

²⁰ ICC-01/05-01/08-2990-Red, para. 3.

²¹ ICC-01/05-01/08-2990-Red, para. 18.

²² Annex H - Letter from Mr. Jean-Jacques Badibanga to Peter Haynes QC, 10 March 2014.

27. The Requested Information is comprised of the information requested by the Defence in its letters to the Prosecution in Annexes A, B, D, E, and G.

C. SUBMISSIONS

The Requested Information falls within the Prosecution's disclosure obligations

28. The Requested Information falls into three main categories:

- i. Information which is germane to the protection of Defence witnesses;
- ii. Information concerning requests for assistance directed to national authorities; and
- iii. Information concerning the circumstances under which Defence witnesses were interviewed, which might be relevant to the credibility and reliability of any statements taken through such interviews.

(i) Information pertaining to the protection of Defence witnesses

29. Even if witnesses are not the property of either party, the Defence has both a duty and an interest in ensuring the effective protection of any persons who provide evidence or information, which is relevant to the Defence of Mr. Bemba. The Defence also has a direct interest in ensuring that the Prosecution has not misled the Court in order to justify the imposition of significantly prejudicial measures against the Defence.

30. In its submissions to the Single Judge, the Prosecution unequivocally stated that the anonymous informant had “provided reliable information **on the identity** and the travel itineraries of one Defence witness – [REDACTED] (D04-52)”.²³

31. It was either wrong for the Prosecution to have stated this to the Single Judge (presumably with a view to bolstering the credibility of its anonymous informant), or wrong (or at best, misleading) for the Prosecution to have later asserted to the Defence that “[the anonymous informant] did not give us any witness names” and that “we never provided the informant with information of the identities of Defence witnesses.”

32. The Prosecution cannot have it both ways: either the anonymous informant provided information on the identity of a Defence witness or he did not.

33. If the former, then in accordance with its duties under Article 54(1)(b) and Article 54(3)(f), the Prosecution should have investigated further as to how this person was aware of both the identity and movements of a Defence witness, and immediately informed both the VWU and the Trial Chamber.

34. This is particularly the case as the Prosecution has advocated in the different cases before the ICC that during the course of investigations, the parties must avoid mentioning the names of witnesses (even if they do not disclose that they are a witness), and if they have grounds to suspect that someone might be aware of the identity of a witness, they must report that fact immediately to the VWU.²⁴

35. Indeed, the Prosecution had gone further and advocated that the Defence must inform the Prosecution as well, and keep a log of all persons with whom it has discussed a Prosecution witness.²⁵

²³ ICC-01/05-44-Red, para. 10.

²⁴ ICC-01/04-01/07-1720-Red (the related ruling are ICC-01/04-01/07-2047, para. 19, and ICC-01/04-01/07-2007-Anx1).

²⁵ ICC-01/04-01/07-1720-Red, paras. 16-17.

36. The Prosecution has also averred that it was unnecessary to subjugate the Prosecution to a Court-issued protocol, as the Prosecution is already obliged to exercise particular diligence with all victims and witnesses (including Defence witnesses), pursuant to the terms of Article 54.²⁶

37. It therefore follows that the Prosecution has itself recognised that its obligations under Article 54(1)(b) and Article 54(3)(f) should have compelled it to refrain from discussing a Defence witness with the anonymous informant in the first place, and taken appropriate measures subsequently, including notifying VWU and the Defence that a person outside of the Defence team appeared to be away of sensitive issues (including travel itineraries) of a Defence witness.

38. Similarly, the Prosecution's failure to respond to the specific question from the Defence concerning whether it met either a Defence witness on 12 October 2012, or a person who was in possession of information concerning a Defence witness, must be viewed as being deliberately obstructive and incompatible with the Prosecution's stringent protective duties. If, however, the Prosecution did not discuss the identity of this witness with the anonymous informant, then the Prosecution provided false information to the Single Judge.

39. The Defence drew the attention of the Prosecution to this discrepancy in its arguments on 24 February 2014.²⁷ Yet, several weeks later, there is no indication that the Prosecution has applied to correct the record or amend its submissions, as required by Article 71(g) of the Code of Conduct for the Prosecution.²⁸ In relation to such important matters, the Prosecution should not be permitted to hide behind

²⁶ ICC-02/11-01/11-37, paras. 4, 17.

²⁷ Annex D - Letter from Mr. Peter Haynes QC to Mr. Jean-Jacques Badibanga, 24 February 2014.

²⁸ "Without prejudice to the standards of conduct applicable to all Staff members, those representing the Prosecutor at hearings before the Chambers of the Court shall, in particular: (g) not deceive or knowingly mislead the Court, judge, counsel, or the Registry and take all necessary steps to correct an error or inaccuracy as soon as possible after it has been discovered", OTP2013/024322.

evasive language, but should be compelled to clearly and exhaustively respond to the Defence questions on this matter.

(ii) *Information concerning requests for assistance*

40. The jurisprudence of the ICC confirms that requests for assistance between the ICC Prosecution and States fall within the scope of the Prosecution's Rule 77 disclosure obligations.²⁹

41. Since there is an overriding principle in favour of full-disclosure, the Prosecution cannot simply assert that disclosure might endanger its investigations, it must demonstrate how and why disclosure of the information – even in redacted form - would prejudice its investigations.³⁰

42. The Prosecution disclosed information pertaining to such requests for assistance in the past in connection with admissibility proceedings, potential abuse of process applications, or Rule 77 in general.³¹ The Appeals Chamber has also implied that diligent Counsel for the Defence should request disclosure of correspondence between the Prosecution and States in order to assess the role of the Prosecution, if any, in violations of the rights of the Defence.³²

43. The Defence has requested information concerning requests for assistance directed to the DRC, which pertain to the Defence case. The request is thus specifically linked to Defence issues, and falls squarely within the notion of information which is material to the preparation of the Defence. Any information obtained by the Prosecution for the purpose of challenging the Defence case is also

²⁹ ICC-01/04-01/06-3017.

³⁰ ICC-01/04-01/06-3031.

³¹ ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275. In the *Katanga* case, pursuant to Rule 77, the Prosecution disclosed correspondence between OTP and DRC concerning the provision of evidence and assistance to the DRC; ICC-01/04-01/07-949, footnote 41.

³² ICC-01/04-01/06-772, para. 42.

disclosable to the Defence, irrespective as to whether the Prosecution actually relied on the information.³³

44. The Prosecution has impugned the credibility and reliability of Defence evidence as a whole.³⁴ Given the broad allegations of the Prosecution, it is both appropriate and necessary for the Prosecution's corresponding disclosure obligations to be construed in the same broad manner.³⁵ In particular, the Defence must be put in a position which it can verify and contest the reliability of the source of any information used to attack the credibility of the Defence case.³⁶ The existence and scope of any assistance from the DRC authorities is thus directly relevant to the preparation of the Defence.

(iii) *Information concerning the circumstances under which Defence witnesses were interviewed*

45. The Prosecution's application to admit Article 70 evidence appears to be premised on the hypothesis that the Defence witnesses were amenable to changing their testimony through inducements. Absent such a nexus, it would not necessarily follow from the Prosecution's assertion that the witnesses were given financial incentives of some sort that the witnesses in fact modified their testimony as a result of these financial incentives.³⁷

46. If the witnesses in question are, by nature, susceptible to modifying their testimony, then it equally follows that they may have been induced to provide false testimony to the Prosecution through promises of witness relocation and/or assistance, or through the application of potentially coercive measures.³⁸ These are issues which the Defence is entitled to explore.

³³ ICC-01/04-01/06-2624.

³⁴ ICC-01/05-01/08-2940, para. 3.

³⁵ ICC-02/05-03/09-501, para. 38.

³⁶ ICC-01/04-01/10-47, para. 16.

³⁷ ICC-01/09-02/11-868-Red, para. 37.

³⁸ The possibility that a witness may have been interviewed in detention is relevant to the voluntariness of the interview since detention (or a detention-like environment) creates a coercive environment: *Prosecutor v.*

47. [REDACTED].³⁹ Again, if that is the case, then the Defence should be entitled to compare the quantum of money or assistance that might have been given to them by the Prosecution during the course of its investigations.

48. [REDACTED].⁴⁰

The Prosecution has failed to provide any justification for failing to disclose the Requested Information

49. The Prosecution cannot make an unilateral determination not to disclose material. Rather, if the material falls within the scope of Article 67(2) or Rule 77 (which must be defined broadly), the Prosecution must either disclose the material immediately, or seize the Chamber in a timely manner to be exempted from disclosure.

50. The Prosecution did neither.

51. The Prosecution has never disputed that the Requested Information falls within Article 67(2) of the Statute or Rule 77. Rather, the Prosecution has sought to exempt itself (on a unilateral basis) from disclosing the Requested Information by arguing that:

- i. The Prosecution is only obliged to disclose material, which is relevant to the credibility and reliability of information which the Prosecution is seeking to

Bagosora, ICTR-98-41-T, 'Decision on the Prosecutor's Motion For The Admission Of Certain Materials Under Rule 89 (C)', 14 October 2004. The question as to whether the witness was interviewed as a suspect (either in relation to allegations pertaining to the main case, or the Article 70 proceedings) is also disclosable: *Prosecutor v. Halilovic*, IT-01-48, 'Decision on Addendum to Further Defence Report *re* Access to *Foss* Material and Additional Motions *re* Criminal Record of Prosecution Witnesses filed on 5 January 2005 and 11 February 2005, Decision of 18 March 2005.

³⁹ [REDACTED]

⁴⁰ [REDACTED]

admit into the proceedings, after the Prosecution evidence has been admitted;⁴¹ and

- ii. The mere fact that the requested information is relevant to another case is grounds for refusing disclosure.

52. In terms of the first ground, if this were correct, the Defence would be prevented from raising pertinent arguments concerning the credibility and probative value of the evidence, until it would be too late to make such arguments.

53. This is the very definition of sharp trial tactics: the Prosecution is actively preventing the Defence from accessing information which might impact on the prospects of the Prosecution application to admit the evidence. The Prosecution has itself recognised that it would be inappropriate to “conduct a premature credibility assessment on the basis of an incomplete snapshot of the evidence, edited by one of the parties’.”⁴²

54. Rule 77 obliges the Prosecution to disclose information which is material to the preparation of the Defence: the deliberate use of the word ‘preparation’ underscores that the Prosecution must disclose information to the Defence sufficiently in advance of actual litigation so that Defence can utilise the material in an effective manner i.e. during the preparation stage.

55. The Requested Information was relevant to the ability of the Defence to prepare its response to the Prosecution Application to admit the Article 70 evidence. Moreover, irrespective as to whether the Trial Chamber actually admits the Article 70 evidence, the Requested Information may also be relevant to any future litigation concerning the extent to which the Article 70 investigation has prejudiced Mr. Bemba’s rights in the main case.

⁴¹ ICC-01/05-01/08-2990-Red, para. 3.

⁴² ICC-01/09-02/11-848-Red, paras 6 and 102. See also *Prosecutor v. Blagojevic et al*, IT-02-60, ‘Joint Decision on Motions Related to the Production of Evidence’, 12 December 2002, para. 24, concerning the obligation to disclose the ‘context’ of incriminating evidence.

56. ICC jurisprudence confirms on this point that the Prosecution's disclosure obligations under Rule 77 can be triggered by putative litigation developments.⁴³ The Defence should also not be required to divulge in full its future strategy in order to trigger such Rule 77 obligations.⁴⁴ It suffices that the Requested Information could be relevant to:

- i. arguments concerning the reliability, weight or context of the Article 70 evidence; or
- ii. the conduct of the Prosecution, and existence of potential prejudice to the Defence.⁴⁵

57. With respect to the Prosecution's attempt to rely on the relevance of the Requested Information to the Article 70 case in order to justify non-disclosure, this position is entirely illogical and unsupported by the case law and practice of the Court.

58. The Prosecution's disclosure obligations are an essential component of the principle of equality of arms, and ensure that the Defence can access information *via* the Prosecution, which might otherwise be unavailable through its own investigative efforts.⁴⁶ Accordingly, the Prosecution cannot, on the one hand, fence off material which is relevant to the Article 70 case for the purposes of disclosure to the Defence, whilst at the same time, plunder the Article 70 proceedings itself in order to attempt to resurrect its own case in the penultimate stages of the trial.

59. The jurisprudence of the ICC and the *ad hoc* Tribunals is clear on this point. The Prosecution is one organ and is expected to review continuously evidence in the possession of all of its pre-trial and trial teams in order to ascertain whether any of the materials could be relevant to the case in question, and to disclose as soon as

⁴³ ICC-01/04-01/10-47, para. 14.

⁴⁴ ICC-01/04-01/06-1433, para. 1.

⁴⁵ ICC-01/04-01/06-649, ICC-01/05-01/08-632.

⁴⁶ ICC-02/05-03/09-501, para. 34.

practicable.⁴⁷ This obligation exists even if the material in question might be classified as *ex parte* in other proceedings.⁴⁸

60. This obligation is particularly stringent where the two proceedings are overseen by the same trial attorney, as would appear to be the case here.⁴⁹

61. The Prosecution has also merely asserted that the information is ‘relevant’ to the Article 70 case: it has not invoked protective measures as a bar to disclosure, nor has it indicated that its Article 70 investigations could be prejudiced through such disclosure. In the absence of any such objective impediments, the irresistible conclusion is that the Prosecution has withheld disclosure for strategic reasons alone. Such behaviour demands an appropriate remedy, as will be elaborated below.

The Prosecution’s failure to disclose the Requested Information has and continues to occasion prejudice to the Defence, which cannot be cured through disclosure alone

62. Three and a half months since the Prosecution submitted its application to admit Article 70 evidence, the Prosecution has not submitted any Article 67(2) or Rule 77 materials pertaining to its application. To the contrary, the Prosecution’s curt and evasive responses to specific and targeted Defence requests have impeded the ability of the Defence to investigate pertinent issue and raise relevant matters to the Trial Chamber in a timely manner.

⁴⁷ICC-01/04-01/06-2471, Regulation 42 of the ICC Regulations of the Court, *Prosecutor v. Brdjanin*, IT-99-36-A, “Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials” 7 December 2004, p. 4; *Prosecutor v. Brdjanin*, IT-99-36-A, Decision on “Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment While Matters Affecting Justice and a Fair Trial can be resolved”, 30 October 2002, para. 29; *Prosecutor v. Bagasora*, Decision on Interlocutory Appeals on Decision on Witness Protection Orders, 6 October 2005, para. 44; *Prosecutor v. Krstic*, IT-98-33-A, Appeal Judgment, 19 April 2004, para. 206.

⁴⁸ *Prosecutor v. Djordjevic*, IT-05-87/1-PT, “Decision on Vlastimir Djordjevic’s Motion for Access to Transcripts, Exhibits and Documents in Prosecutor v. Slobodan Milosevic, Case No. IT-02-54”, 6 February 2008, para. 12

⁴⁹ *Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-T, Trial Judgment, 30 September 2000, , paras. 166, 172-173.

63. Even if the Prosecution were to effect immediate disclosure at this juncture, its failure to have done so until this point has already had a significant impact on the expeditiousness of the proceedings. This is of particular importance to a defendant who has been kept in detention for approximately 6 years.

64. The Prosecution has also adopted the stated position of refusing to engage in the disclosure process as concerns any information which might be relevant to the Article 70 case.⁵⁰ Not only does this constitute an illegal abrogation of the Prosecution's disclosure obligations – which are central to Mr. Bemba's right to a fair trial⁵¹ – but it also evidences the strong probability that there is other exculpatory or relevant material, which the Prosecution should have disclosed (even absent a specific request from the Defence),⁵² but which it has not in fact disclosed. The case is therefore tainted by a presumption that there may be crucial exculpatory information, which is either known to the Prosecution or in its possession, which has not been brought to the attention of the Defence.

65. The fact that this is not a hypothetical assumption is underlined by the Prosecution's failure to alert the Defence or the Trial Chamber to Article 70 proceedings, which had a considerable impact on the reliability and relevance of its application to admit Article 70 evidence into the main case.⁵³

66. The Defence therefore reserves the right to present additional submissions as and when it is in a position to assess the full extent of the Prosecution's disclosure violations, and the corresponding prejudice, which this has occasioned to Mr. Bemba's right to a fair, impartial and expeditious trial.

⁵⁰ Annex H - Letter from Mr. Jean-Jacques Badibanga to Peter Haynes QC, 10 March 2014.

⁵¹ ICC-02/05-03/09-501, para. 34.

⁵² "The Prosecutor has an obligation to disclose information that is material to the preparation of the defence pursuant to rule 77 independently of any request from the defence", ICC-02/05-03/09-501, para. 34.

⁵³ ICC-01/05-01/08-3016.

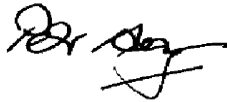
D. RELIEF SOUGHT

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

ORDER the Prosecution to disclose the Requested Information; and

REMAIN SEIZED of the need to sanction the Prosecution by either excluding any incriminating material or charges to which the Requested Information relates, or drawing inferences either against the Prosecution or in favour of the Defence, as appropriate.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

19 March 2014