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Pénale  
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**International  
Criminal  
Court**



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Date: **3 June 2014**

**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 document**

**Public Redacted Version of “Prosecution’s Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding”, ICC-01/05-01/08-3052-Conf, 22 April 2014**

**Source:** The Office of the Prosecutor

**Document to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:**

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## I. Introduction

1. Pursuant to the Chamber's 12 March 2014 decision ("Decision"),<sup>1</sup> the Prosecution urgently files this "further request" for a "final decision" on the disclosure of material in this case to the Defence teams in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba et al.* ("Article 70 case"). As proposed by the Defence, the redacted transcripts of evidence omit information crucial to prosecuting the Article 70 case, and prevent the Prosecution from fully discharging its disclosure obligations, as required by the Single Judge of Pre-Trial Chamber II.

2. In view of the Decision, the Prosecution requests authorisation to disclose the unredacted transcripts of evidence for 14 *Bemba* Defence witnesses and one Court witness, and five confidential filings<sup>2</sup> under Regulation 42(2) of the Regulations of the Court. As outlined in the Prosecution's previous application,<sup>3</sup> Regulation 42(2) governs this Request because the material will be disclosed in subsequent proceedings and will require no additional protective measures.

3. Alternatively, should the Chamber determine that Regulation 42(3) applies, the existing protective measures should be varied to permit the Prosecution to disclose the requested transcripts of evidence unredacted. First, the evidence to be disclosed is material to the Article 70 case, as this Chamber implicitly found;<sup>4</sup> second, the Prosecution will rely on the material in its document containing the charges in the Article 70 case ("DCC"), during the confirmation proceedings and at trial, and therefore has a corresponding disclosure obligation; third, there is no additional risk

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<sup>1</sup> ICC-01/05-01/08-3014, para. 19.

<sup>2</sup> Although the Prosecution's original request addressed only transcripts of evidence, the same disclosure obligation extends to the confidential filings and the transcripts of evidence of a Court witness. The Request is therefore extended.

<sup>3</sup> ICC-01/05-01/08-2979, para. 9.

<sup>4</sup> ICC-01/05-01/08-3014, pp. 11-12 (authorising the Prosecution's disclosure of the proposed redacted evidence).

to the witnesses arising from the disclosure of their unredacted testimony; and fourth, the Defence teams in the Article 70 case are bound to abide by the existing protective measures.

## II. Confidentiality

4. This Request is filed confidentially because it reveals confidential details of witnesses' evidence and it refers to filings of the same designation.

## III. Urgency

5. The Prosecution will file its DCC in the Article 70 case on 30 May 2014.<sup>5</sup> The Chamber's urgent disposition of this Request is essential to the Pre-Trial Chamber seized with the Article 70 case and to the parties' respective preparation.

## IV. Submissions

6. The Prosecution seeks to disclose in the Article 70 case: the unredacted transcripts of evidence of 14 *Bemba* Defence witnesses<sup>6</sup> and one Court witness,<sup>7</sup> two confidential filings by the Legal Representatives [REDACTED],<sup>8</sup> the confidential Defence [REDACTED],<sup>9</sup> the confidential summaries of the proposed trial testimony of Defence witnesses,<sup>10</sup> and one confidential Registry filing.<sup>11</sup>

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<sup>5</sup> Rule 121(3); ICC-01/05-01/13-255, p. 7.

<sup>6</sup> Listed below at para. 14.

<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> ICC-01/05-01/08-2222-Conf-AnxA.

<sup>11</sup> [REDACTED].

A. The Prosecution requests authorisation to disclose this material under Regulation 42(2).

7. Regulation 42(2) operates *lex specialis* regarding the Prosecution's disclosure of material subject to protective measures in subsequent proceedings absent any need for a variation. In carrying out such disclosure, the regulation imposes on the Prosecution only the obligation to "inform the defence to whom the disclosure is being made of the nature of these protective measures".<sup>12</sup>

8. Regulation 42(2)'s purpose is to obviate discrete and repeated applications by the Prosecution to Chambers to effect required disclosure in subsequent proceedings when a variation of existing protective measures is not required. Regulation 42(2) recognises the Prosecution's obligation to disclose material in related cases and the security interests of affected victims or witnesses in requiring that the Defence in subsequent proceedings be notified of any pre-existing protective measures, by which they are bound under Regulation 42(1).

9. At the *ad hoc* tribunals, disclosure similar to that which the Prosecution requires and requests here is routine. Rule 75(F) of the ICTY's and ICTR's Rules of Procedure and Evidence is equivalent to Regulation 42(2). Worded almost identically,<sup>13</sup> these tribunals' rules do not require the Prosecution to seek the authorisation of the Chamber that issued protective measures in the first instance to disclose material (including prior closed session witness testimony and other confidential evidentiary

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<sup>12</sup> Regulation 42(2); see also ICC-01/05-01/13-338, p. 4 ("Considering that the [Defence's use of material in another case] is without prejudice to Jean-Pierre Bemba's and his Counsel's duties to fully comply with any and all protective measures which are applicable and in force *vis-à-vis* the materials to be accessed").

<sup>13</sup> See [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev49\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf), pp. 75-76.

material) in subsequent proceedings. In such circumstances, the Defence must simply be given notice of the protective measures in place.<sup>14</sup>

10. This same reasoning and practice informs Regulation 42(2). Here, the Prosecution's disclosure obligation arises because the material at issue forms the basis of the charges described in its DCC, and the Prosecution intends to rely on it during the confirmation proceeding and at trial. Under Regulation 42(2) the Prosecution's disclosure of the unredacted transcripts of evidence requires only that the Article 70 Defence teams are informed of the protective measures in place (*e.g.*, that the identities of witnesses and other information dealt with in private and closed session may not be made public). As noted, Regulation 42(1) ensures that such measures continue in a subsequent proceeding with full force and effect. No further ruling or decision by a Chamber is necessary.

11. Although Regulation 42(2) foresees a change in the scope of access to protected material in subsequent proceedings, it imposes no additional obligation to petition the Chamber to vary existing protective measures under Regulation 42(3) for this purpose. This is because the disclosed materials remain entirely within the context of proceedings before, and fully regulated and controlled by, the Court. If, in such circumstances, a change in the scope of access to protected materials disclosed in subsequent proceedings required (by definition) an application for a variation under

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<sup>14</sup> See, *e.g.*, *Prosecutor v Bizimungu et al.*, Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence, 2 February, 2005, para. 6; see also *Prosecutor v. Nyiramasuhuko et al.*, Decision on the Prosecutor's ex-parte and Extremely Urgent Motion to Access Closed Session Transcripts in Case No. ICTR-96-3-A to Disclose to Case No. ICTR-98-42-T, 23 September 2004; *Prosecutor v. Nahimana et al.*, Decision on Disclosure of Transcripts and exhibits of Witness X, 3 June 2004; *Prosecutor v. Pauline Nyiramasuhuko et al.*, Decision on the Prosecutor's Motion for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75, 16 December 2004; *Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence, 2 February 2005.

Regulation 42(3), then Regulation 42(2) would be rendered unnecessary and superfluous.

12. To the contrary, the two provisions address different circumstances. Regulation 42(3) applies only where there is a need to vary protective measures arising separately from, or in addition to, required disclosure in subsequent proceedings.<sup>15</sup> Here, the Prosecution's Request necessitates no such modification, which VWU's observations confirm.<sup>16</sup> In so far as the existing protective measures will continue to apply *mutatis mutandis* in the Article 70 proceedings, the requested disclosure does not amount to a variation requiring the Chamber's further consideration under Regulation 42(3).

B. Should the Chamber consider that Regulation 42(3) applies, it should nevertheless authorise the requested disclosure

- a. The Prosecution has a disclosure obligation in the Article 70 case arising from its reliance on the materials and their inclusion in the DCC*

13. As detailed below, the requested materials are used in the DCC. The Prosecution intends to rely on them during the confirmation proceedings and at trial. As such, Rule 77,<sup>17</sup> Rule 121(3),<sup>18</sup> and the Single Judge<sup>19</sup> require the Prosecution to disclose this evidence in advance of the confirmation proceedings.

- i. The transcripts of evidence of Defence witnesses should be disclosed unredacted

<sup>15</sup> See ICC-02/05-03/09-49, para. 12.

<sup>16</sup> ICC-01/05-01/08-3014, para. 6; ICC-01/05-01/08-2960, para. 1.

<sup>17</sup> "The Prosecutor shall . . . permit the defence to inspect any [material] intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing".

<sup>18</sup> "The Prosecutor shall provide to . . . the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges".

<sup>19</sup> ICC-01/05-01/13-255, p. 7.

14. The transcripts of evidence of 14 *Bemba* Defence witnesses should be disclosed without redaction. The Defence's proposed redacted transcripts of these witnesses' evidence restrict material fundamental to the prosecution of the Article 70 case. For example:

1. D-64's name;<sup>20</sup>
2. D-57's name;<sup>21</sup>
3. D-55's name, [REDACTED];<sup>22</sup>
4. D-54's name, contact with the Defence, [REDACTED];<sup>23</sup>
5. D-45's name;<sup>24</sup>
6. D-29's name;<sup>25</sup>
7. D-26's name [REDACTED];<sup>26</sup>
8. D-25's name;<sup>27</sup>
9. D-23's name, [REDACTED];<sup>28</sup>
10. D-15's name [REDACTED];<sup>29</sup>
11. D-7's name [REDACTED];<sup>30</sup>
12. D-4's name [REDACTED];<sup>31</sup>
13. D-3's name [REDACTED];<sup>32</sup> and
14. D-2's name [REDACTED].<sup>33</sup>

15. The Prosecution relies on this material in charging the Article 70 suspects. The omission of witnesses' names is particularly problematic. Without this information,

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<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> [REDACTED].

the Prosecution cannot link other evidence of alleged corruption to a given witness. For example, commercial money transfer records and telephone attribution lists refer to payees and owners by name. Thus, practically, it is not possible to attribute such evidence demonstrating corrupt influence to any given witness in the *Bemba* case without also revealing to the Article 70 Defence teams that the specific individual was a witness in this case, violating the existing protective measures.

16. As things currently stand, reliance on the redacted transcripts of evidence undermines the Prosecution's ability to prove the corrupt influencing of witnesses and their provision of false testimony under Article 70(1)(a)-(c). Further, even if the Prosecution could somehow surmount this obstacle, the disclosure and use of the redacted transcripts may nevertheless jeopardise the overall fairness of the Article 70 confirmation or trial process. For at least two defence teams, the identities of the testifying Defence witnesses forming the basis of the crimes charged will be unknown.

17. The *Katanga* Trial Chamber observed that "[REDACTED]".<sup>34</sup> Likewise, in the *Ntaganda* case the Chamber observed, "[REDACTED]".<sup>35</sup> Here, the situation is even more direct: witnesses in one case allegedly testified falsely, their testimony therefore comprises material evidence of the crimes charged in the Article 70 case.

ii. The Chamber should permit disclosure of the court witness' transcript of evidence and five confidential filings

18. The court witness' transcript of evidence and five confidential filings detailed at paragraph six also require disclosure because they are central to charges in the DCC. [REDACTED] reference 14 allegedly false or forged documents underpinning

<sup>34</sup> ICC-01/04-01/07-3428-Conf, para. 6.

<sup>35</sup> ICC-01/04-02/06-244-Conf, para. 10.

charges under Article 70(1)(b).<sup>36</sup> [REDACTED] Mr. Arido, one of the suspects in the Article 70 case. [REDACTED] form the basis of the Prosecution's charges of the corrupt influencing of witnesses under Article 70(1)(c) and the presentation of false testimony under Article 70(1)(b).<sup>37</sup>

*b. Regulation 42 must be read consistently with the Statute and the Rules*

19. The hierarchy of the Court's statutory framework requires reading Regulation 42 harmoniously with the Statute and the Rules. To the extent that Regulation 42(4) applies – which it may not in this instance<sup>38</sup> – its wording (“shall . . . whenever possible”) affords the Chamber a measure of discretion. In this case, where the witnesses' failure to consent cannot be a dispositive impediment<sup>39</sup> to the disclosure of their transcripts of evidence in the Article 70 case because of the Prosecution's Rule 77 and 121(3) disclosure obligations, the Chamber should exercise this discretion and choose, exceptionally, to order disclosure without seeking consent.

20. Indeed, it is not “possible” to obtain the views of the witnesses in this situation, where witnesses who were allegedly corruptly influenced are unlikely to consent to disclosure, given their alleged involvement in the charged Article 70 offences. The Chamber should exercise its discretion to avoid creating a situation where witnesses (and suspects) implicated in perpetrating Article 70 offences effectively control access to or use of evidence material to proving their alleged wrongdoing.

<sup>36</sup> See ICC-01/05-01/13-1-Red2-tENG, paras. 14, 16, 19.

<sup>37</sup> See ICC-01/05-01/13-1-Red2-tENG, paras. 13, 14.

<sup>38</sup> See ICC-01/05-01/08-2979, paras. 5-8.

<sup>39</sup> In the ICTR case of *Simba* it was held that the absence of consent by a protected witness is not determinative of whether testimony should be disclosed to a third party. See *Prosecutor v. Simba*, Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses before the Tribunal, 9 April 2008, para. 8; Karim Khan & Rodney Dixon, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (Sweet & Maxwell, 3<sup>rd</sup> ed., 2009), p. 664-5, § 8-263.

*c. There is no additional risk to the witnesses*

21. The VWU confirmed that disclosure of the unredacted transcripts of evidence to the suspects in the Article 70 case “would not negatively impact the security of witnesses”.<sup>40</sup> Thus, witness security and safety is not a concern.

*d. The Defence is bound to respect existing protective measures*

22. However the Chamber resolves this Request, as the Decision notes, the Defence teams in the Article 70 case are bound to respect any extant “confidentiality obligations”.<sup>41</sup>

**C. Modalities of implementation.**

23. Should the Chamber grant the requested relief, the Prosecution proposes that disclosure be implemented *via* TRIM, by the Registry. In this way, the material in the case record can quickly and easily be made available to the Defence teams in the Article 70 case.

**V. Requested Relief**

24. The Prosecution requests the Chamber to permit its disclosure to the Defence in the Article 70 case of: (i) the unredacted transcripts of evidence of the 14 *Bemba* Defence witnesses listed in paragraph 14 and one Court witness ([REDACTED]); (ii) two confidential filings by the Legal Representatives [REDACTED]; (iii) [REDACTED]; (iv) a summary of the proposed trial testimony of Defence witnesses

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<sup>40</sup> ICC-01/05-01/08-3014, para. 6; ICC-01/05-01/08-2960, para. 1.

<sup>41</sup> ICC-01/05-01/08-3014, para. 15; see also Regulation 42(1).

(ICC-01/05-01/08-2222-Conf-AnxA); and (v) a confidential Registry filing ([REDACTED]).

25. Given the impact of the Decision on the Article 70 case, the Chamber may consider it helpful to consult with Pre-Trial Chamber II pursuant to Article 64(4) in its determination or implementation of this matter.



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Fatou Bensouda, Prosecutor

Dated this 3<sup>rd</sup> day of June 2014  
At The Hague, The Netherlands