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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR
v. Jean-Pierre Bemba Gombo

Public

Public Redacted version of Defence request for a stay of proceedings and request for further 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:

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A. BACKGROUND

1. The Prosecution in the present case has developed a practice of systematically failing to meet its disclosure obligations, particularly the disclosure of materials pursuant to Rule 77 of the Rules of Procedure and Evidence.¹ In a recent decision finding that the Prosecution had failed to disclose documents material to the preparation of the Defence, Trial Chamber III ('the Chamber') noted that 'the Chamber has previously expressed its regret in relation to the prosecution's failure to meet its disclosure obligations in a timely manner.'² Recently, by reason of the simple expedient of being compelled to disclose material it wishes to use in case ICC-01/05-01/13 ('Article 70 Case') the Prosecution has purported to make belated disclosure of material it has knowingly had in its possession for several years but which it has expressly declined to disclose to Mr Bemba during the current trial process.

2. Information that undermines or supports the evidence, or the credibility, of proposed Defence witnesses falls within the scope of Rule 77 and must be disclosed. The Prosecution has been aware of this obligation since it was enunciated in *Lubanga* in November 2010.³ The rationale behind this obligation is clear. It is 'likely to assist trial efficiency, because it will increase the likelihood that only those witnesses are called who are, on an examination of all the relevant material, credible and reliable.'⁴ The ICTY and ICTR took the same approach to material concerning the credibility of Defence witnesses, with the Appeals Chamber finding this material was disclosable to the Defence as it 'may

¹ See, for example, ICC-01/05-01/08-2924-Red, para. 15: 'At the outset, and before considering the merits of the Defence Motion, the Chamber regrets that, after having received the specific communications from Witness 169, the prosecution waited for over four months before seeking the Chamber's guidance in relation to any disclosure requirements resulting from that material. In view of this delay, the Chamber reiterates its instruction that "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"; [REDACTED]. ICC-01/05-01/08-3255, para. 83: 'Therefore, where the Prosecution wishes to withhold disclosure on the basis of Rule 81(2), it must apply to the Chamber to receive authorisation to do so. While the Chamber notes the Prosecution's statement that it notified the Chamber of the existence of its Article 70 Investigation, the Prosecution did not apply to the Chamber for a ruling as to whether it must disclose relevant Rule 77 information or material or not. As such, the Chamber finds that insofar as the Prosecution was (i) in the possession of and (ii) did not disclose Rule 77 information on the grounds that it could prejudice further or ongoing investigations without applying to the Chamber for authorisation, it failed to satisfy the requirements of Rule 81(2).'

² ICC-01/05-01/08-3167-Conf, para. 48.

³ ICC-01/04-01/06-2624, para. 18.

⁴ ICC-01/04-01/06-2624, para. 18.

improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence.’⁵

3. Now, nearly three years after the start of the Defence case, the Prosecution has finally disclosed information directly relevant to the credibility of Defence witnesses, which it gathered at the commencement of the Defence case in 2012. The disclosure occurred on 8 June 2015 (“the Material”).

4. The Material comprises, *inter alia*, an investigator’s report of a meeting between the Prosecution and Prosecution Witness P-31 in [REDACTED] on 2 August 2012, the purpose of which was ‘to make inquiries about any possible credibility issues of those [REDACTED] who are Defense witnesses who may be known to CAR-OTP-P-0031.’⁶ During the interview, P-31 provided the Prosecution investigators with information concerning the background and credibility of Defence witnesses D-11, D-51, D-52, D-57, and Chamber’s witness CHM-01.⁷

5. The Material also reveals that the same exercise was conducted in October 2012 with CAR-OTP-P-007, a Prosecution ‘contact’ who was not ultimately called to give evidence. P-07 gave a Prosecution trial attorney information concerning the credibility of Defence witnesses D-64, D-52, D-57, D-51, D-4 D-11, D-23 and D-26.⁸ He also provided information concerning [REDACTED] – a key component of the Defence case.⁹

6. It is beyond dispute that the Material was disclosable under Rule 77, demonstrated, *inter alia*, by the very fact of the Prosecution’s current disclosure of it, albeit three years late. The Defence made repeated requests for disclosure of the Material during the proceedings, both during the period of the hearing of evidence and beyond,¹⁰ including a specific request for an interview with CAR-OTP-PPP-0007, which now forms part of the Material.¹¹

⁵ *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunals Rules of Procedure and Evidence, 25 September 2006, para. 9. See also *Prosecutor v. Delalic et al.* Case No. IT-96-21, Trial Chamber, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996, para. 7.

⁶ CAR-OTP-0084-0079-R01.

⁷ CAR-OTP-0084-0079-R01.

⁸ CAR-OTP-0072-0467.

⁹ [REDACTED]; D04-60, T-243, p.9, line 4 – p.10, line 1.

¹⁰ [REDACTED].

¹¹ ICC-01/05-01/08-3020-AnxB-Red, Letter Defence to Mr. Badibanga, 20 February 2014, pp. 3-4: ‘In the same filing, the Prosecution further stated that, “On 12 October 2012, the Prosecution met with

7. This deliberate non-disclosure is a manifest breach of the Prosecution's statutory obligations. Moreover, the Defence has suffered material prejudice, by being deprived of the opportunity to consider information about the credibility of its own witnesses which was in the Prosecution's possession at the very outset of its Defence case. As noted by the ICTR Appeals Chamber when ordering the disclosure of similar material, '[t]here are few tasks more relevant to the preparation of the defence case than selecting witnesses.'¹² The accused must be entitled to a remedy for such a breach of statutory duty. However, the timing of this disclosure and the current stage of the proceedings render the majority of remedies for disclosure violations obsolete. The only sensible and meaningful remedy is a stay of the present proceedings.

B. APPLICABLE LAW

8. Article 54 of the Statute sets out '[d]uties and powers of the Prosecutor with respect to investigations, and provides that the Prosecutor shall:

[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.

9. The rights of an accused are set out in Article 67 of the Statute, which provides:¹³

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; [...]

[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 testified that he was [REDACTED]. [REDACTED] stated that in fact [REDACTED] had [REDACTED]" [...] Since any transcripts, minutes, or statements engendered by this meeting predated the Article 70 investigation and appear to have been collected pursuant to the Prosecution's investigation into the Defence case, I further request that the Prosecution disclose them to the Defence immediately, and provide an explanation as to why they were not disclosed at an earlier juncture pursuant to Rule 77.

¹² *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunals Rules of Procedure and Evidence, 25 September 2006, para. 9.

¹³ Emphasis added.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, **as soon as practicable**, disclose to the defence evidence **in the Prosecutor's possession or control** which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

10. Rule 77 of the Rules of Procedure and Evidence sets out an obligation on the Prosecution to disclose exculpatory evidence, and provides that:¹⁴

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82 permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, **which are material to the preparation of the defence** or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

11. The Chamber has previously examined the meaning of ‘material to the preparation of the defence’ and held that, in line with the consistent jurisprudence of the Court, ‘the prosecution's disclosure obligations under Rule 77's materiality prong are broad.’¹⁵

12. The Chamber has considered itself to be guided ‘first and foremost by the Appeals Chamber judgement in the Lubanga case’, where the Appeals Chamber held that ‘the term [‘material to the preparation of the defence’] should be understood as referring to all objects that are relevant for the preparation of the defence.’¹⁶ The Trial Chamber also found ‘instructive’ a decision in *Lubanga* in which Trial Chamber I ordered the prosecution to disclose any material in its possession that ‘is relevant and concerns defence witnesses’, including material that the prosecution intended to use in the questioning of defence witnesses. In doing so, Trial Chamber I discussed the scope of Rule 77's materiality requirement in the following terms:¹⁷

[...] the prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, inter alia, any item that is

¹⁴ Emphasis added.

¹⁵ ICC-01/05-01/08-3070, para. 23.

¹⁶ ICC-01/05-01/08-1594, para. 17, citing *Prosecutor v. Lubanga*, ICC-01/04-01/06-1433, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, para. 2.

¹⁷ ICC-01/05-01/08-1594, para. 19, citing ICC-01/04-01/06-2624, para. 16.

relevant to the preparation of the defence, and including not only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation.

C. SUBMISSIONS

(i) The Prosecution is in breach of its disclosure obligations

13. The law on the point is settled and unambiguous in the Defence submission. In directly analogous circumstances, Trial Chambers and Appeals Chambers at the ICC, ICTY and ICTR have ordered that material of precisely this nature be disclosed. If the Prosecution gathered information and material that related to the credibility of witnesses who appeared on the Defence list, it was required promptly to disclose such material, ‘not least because it will enable the accused to decide whether or not to call them.’¹⁸

14. Neither can it be argued that, because the Material was not produced during the cross-examination of Defence witnesses, the Prosecution was entitled to conceal it from the Defence. Such an argument was rejected in *Lubanga* where the Prosecution submitted that ‘the underlying information used in questioning by the prosecution (but not introduced, for instance, in documentary form) is not governed by Article 67(2) of the Statute or Rule 77 of the Rules.’¹⁹ The Chamber, to the contrary, held:

In all the circumstances, the information, in the sense described above, that is relevant and concerns defence witnesses who are to be called, is to be disclosed to the defence for preparation, not least because it will enable the accused to decide whether or not to call them. Therefore, information that undermines or supports the evidence, or the credibility, of proposed defence witnesses falls within the scope of Rule 77 of the Rules. This is likely to assist trial efficiency, because it will increase the likelihood that only those witnesses are called who are, on an examination of all the relevant material, credible and reliable. The prosecution is not obliged to disclose its theories or its tactics, but instead it must provide all relevant information and material as regards the defence witnesses.²⁰

15. The ICC Appeals Chamber has held that given that the wording of Rule 77 is based on the wording of Rule 66(B) of Rules of Procedure and Evidence of the ICTY, ‘it is useful to consider the relevant jurisprudence of the ICTY and ICTR on the corresponding

¹⁸ ICC-01/04-01/06-2624, para. 18.

¹⁹ ICC-01/04-01/06-2341, Prosecution's Response to the "Observations de la défense sur l'entendue des obligations du Procureur en matière d'information et de divulgation", paras. 9-11.

²⁰ ICC-01/04-01/06-2624, para. 18.

provisions'.²¹ The ICC Appeals Chamber then cited favourably a decision in the *Čelebići* case, which held that information is material to the preparation of the defence if there 'is a strong indication that... it will play an important role in uncovering admissible evidence, **aiding witness preparation**, corroborating testimony, or assisting impeachment or rebuttal.'²² A wealth of critical information concerning the credibility of Defence witnesses would certainly have aided the Defence in its preparation, and also foreseeably assisted in streamlining the Defence case, as discussed further below.

16. This situation is not novel. In *Lubanga*, following receipt of the Defence witness list and summaries, the Prosecution returned to 'contact those prosecution witnesses who may be able to assist in addressing the defence case.'²³ This process was welcomed by the Lubanga Defence, who noted that 'there is a positive obligation on the prosecution to confront its witnesses with any fresh information provided by the defence, and that under Article 67(2) of the Statute or Rule 77 of the Rules it should disclose the results of its further inquiries to the defence.'²⁴ The Trial Chamber agreed, and was explicit that '[t]hese meetings should be recorded by audio or video equipment, and the prosecution must apply its disclosure obligations following any reinterview.'²⁵ The Prosecution was aware of this requirement at the time it conducted its re-interviews in the Bemba case. Regardless, and in breach of its obligations under Rule 77, it withheld the resultant material for nearly three years before conceding its disclosability and finally providing it to the Defence pursuant to Rule 77 in June 2015.

17. It is unarguable that there is not a breach by the Prosecution of its disclosure obligations in these circumstances, warranting an effective remedy.

(ii) The Defence has suffered material prejudice as a result of the non-disclosure

18. The rationale behind the Prosecution's extensive disclosure obligations in international criminal proceedings is self-evident and well documented in the

²¹ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, para. 78.

²² ICC-01/04-01/06-2624, para. 17, citing: *Prosecutor v Delalić et al.*, Case No. IT-96-21, Trial Chamber, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, para. 7, citing *United States v. Jackson*, 850 F. Supp. 1481, 1503 (U.S. Dist. Ct. D. Kan 1994) (emphasis added).

²³ ICC-01/04-01/06-2192-Red, para. 39.

²⁴ ICC-01/04-01/06-2192-Red, para. 40.

²⁵ ICC-01/04-01/06-2192-Red, para. 66.

jurisprudence. The Prosecution's superior investigative capabilities, an explicit statutory obligation to investigate both incriminating and exonerating circumstances equally, and greater resources than those made available to the Defence, are counterbalanced by a requirement that the Prosecution disclose all information in its possession that is 'material to the preparation of the Defence'. To take an obvious example; the Defence did not have the ability to travel to [REDACTED] and sit down with P-31 to find out what he knew about the individuals appearing on the Defence witness list. The Prosecution did.

19. Once having gathered this information, however, the Prosecution was not permitted to keep it hidden for its own strategic advantage. The practice of the ICC, and international criminal tribunals more generally, gives priority to the efficient conduct of proceedings and the presentation of credible and reliable evidence to the Court. Part of this prioritisation involves the Prosecution providing 'information that undermines or supports the evidence, or the credibility, of proposed defence witnesses' to the Defence.²⁶ This obligation does not preclude the Prosecution from testing the Defence evidence in court. The Prosecution is not obliged to disclose its theories or its tactics, but instead it must provide all relevant information and material as regards the Defence witnesses.²⁷

20. The Prosecution team in the Bemba case made a strategic choice not to share this information with the Defence. Notably, the Prosecution also collected information on CHM-01 which it did not, to the knowledge of the Defence, share with the Chamber. Had this information been shared, the Defence would have been in a position to investigate the claims made about its witnesses to determine their veracity, and cross-check details or explore alleged inconsistencies with the witnesses themselves, prior to putting them on the stand. The Defence may have been disposed to drop particular witnesses from its list, or seek to find other witnesses to replace or corroborate the proposed testimony of the witnesses in question. The entire face of the Defence case may have looked very different, had the accused been given the opportunity to follow the leads now revealed in the Material.

21. To take a concrete example, in October 2012, the Material reveals that the Prosecution was told by P-07 that:²⁸

²⁶ ICC-01/04-01/06-2624, para. 18.

²⁷ ICC-01/04-01/06-2624, para. 18.

²⁸ CAR-OTP-0072-0467 at 0479.

[REDACTED].

22. This information was then used by the Prosecution in its examination of D-23, with Mr. Iverson posing numerous questions in an attempt to demonstrate to the Trial Chamber D-23 was [REDACTED]:

[REDACTED]²⁹

[REDACTED]³⁰

[REDACTED]³¹

[REDACTED]³²

[REDACTED]³³

[REDACTED]³⁴

[REDACTED]³⁵

23. The Prosecution is of course perfectly entitled to explore in cross-examination lines of inquiry arising from intelligence or information it has received, though of course there are limits where the Prosecution has no intention, as in this case, of putting the information in evidential form by, for example, seeking to call the underlying source in rebuttal. Nor does the Defence accept or concede that this piece of information from P-07 is either truthful or reliable. The Material is not in evidence in this case, has not been tested, and the Prosecution's late disclosure has prevented the Defence from investigating its veracity. The basis for the latent suggestion in Mr Iverson's examination of the witness may have been entirely baseless, and the suggestions themselves are evidentially worthless. However, the real issue is that this information was improperly kept from the Defence, in breach of the Prosecution's statutory obligations.

24. Had the Material been disclosed in a timely manner in October 2012 (as opposed to June 2015), the Defence would have been in a position to go back to D-23 and ask him to comment or provide further information on allegations that [REDACTED]. The Defence

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

could have sought, or asked for D-23 to seek out and provide original or otherwise authenticated copies of [REDACTED], photographs or other contemporaneous records or accounts which established that indeed he was [REDACTED]. It could have explored the character of P-07 himself and the relationship he had with the persons about whom he provided information and perhaps forestalled any examination based upon material provided by him altogether. The Defence could have led evidence from other witnesses who knew D-23, were aware of [REDACTED]. If appropriate, the Defence could have sought leave from the Chamber to delay or postpone the testimony of D-23 while these issues were investigated and resolved. Following further investigations, if indeed it turned out that D-23 was [REDACTED], the Defence would have been in a position drop D-23 from its witness list. Critically, the Defence would have been in a position to conduct further investigations to locate, interview, and call another witness who had worked within the [REDACTED], preferably someone who had also [REDACTED]. In this way, the Defence could have presented an alternative witness who would not have been exposed to the same lines of examination by the Prosecution and as such whose evidence would have been harder to impeach and more likely to be accepted by the Trial Chamber during its deliberations, and assist in the process of arriving at the truth. Throughout this process, the Defence would have been able not only to inform Mr. Bemba of these developments, but seek his instructions on key questions. The prejudice is concrete, substantiated, and significant.

25. The same holds true for each of the Defence witnesses listed in the Material. To take another example, in August 2012, the Prosecution was informed, *inter alia*, that D-51.³⁶

[REDACTED].

26. In due course D-51 was questioned at length [REDACTED].³⁷ Again, had the Defence been provided with this information in August 2012, many avenues would have been available. The Defence would have been in a position to speak again with D-51 and take a full history of his [REDACTED] and, if appropriate, performed background investigations on the veracity of the allegations at issue. It could have asked D-51 to obtain copies of relevant documents and materials in his possession or sought them out through other means. If appropriate, the witness could have explained these events and allegations in his examination by the Defence. Alternatively, the Defence may have concluded that the

³⁶ CAR-OTP-0084-0079-R01, at 0081.

³⁷ [REDACTED].

allegations were likely to have such an impact on D-51's credibility, that it was in the best interests of the accused to conduct further investigations and find an alternative witness who was a member of the [REDACTED], and had knowledge of events at [REDACTED] during the conflict. Instructions could have been sought from Mr. Bemba throughout this process. These avenues were all closed off by the Prosecution's non-disclosure.

27. This is precisely why the jurisprudence of the international tribunals requires the Prosecution to disclose this kind of information. In keeping this information hidden, the Prosecution has prioritised its strategic advantage over ensuring the evidence placed before the Chamber was the most credible, and reliable available, and most likely to lead to a full and complete determination of the truth of the events in question.

(iii) A stay of proceedings is the only available meaningful remedy

28. In cases of Prosecutorial non-disclosure, various remedial options are available to the Chamber. These include recalling relevant Prosecution witnesses for further cross-examination, allowing the Defence to call additional witnesses, drawing a reasonable inference in favour of the accused from the exculpatory material, excluding relevant parts of the Prosecution evidence, or affording the Defence more time to conduct investigations and prepare for trial.³⁸

29. The nature of the Material, its extremely late disclosure, and the current stage of the proceedings, mean that many of the conventional remedies for Prosecutorial non-disclosure have been rendered obsolete. This is not a situation where the Prosecution has suddenly discovered a prior inconsistent statement of one of its witnesses, which can be remedied by a delay in the cross-examination of the witness in question. Or where the Prosecution has unearthed relevant exculpatory materials, the prejudice stemming from which can be remedied by a delay in the start of trial to allow for further Defence investigations. Any delay in the present proceedings would have no impact on the prejudice suffered.

³⁸ D. Scheffer, 'A Review of the experiences of the Pre-trial and Appeals Chamber of the International Criminal Court regarding the Disclosure of evidence', 2008 LJIL 21, p. 62; *Prosecutor v. Kenyatta*, ICC-01/09-02/11-728, Decision on defence application pursuant to Article 64(4) and related requests', 26 April 2013, para. 125; *Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-T, Judgement, 30 September 2011, para. 143, citing *Prosecutor v. Augustin Ndingiyimana et al.*, ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), 22 September 2008, paras. 61-62; *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules (TC), 13 December 2005, para. 35.

30. Moreover, given that the Material, properly disclosed, may have disposed the Defence to drop particular witnesses from its list, or seek to find other witnesses to replace or corroborate witnesses on its list, the recall of affected witnesses is also of little assistance. Dismissal of particular charges is inapposite, given that the Material touches on the credibility of numerous witnesses who testified on the entire range of areas in issue in the present case. A retrial, or substantial reopening of the evidence, whilst an appropriate remedy in circumstances of egregious non-disclosure,³⁹ would also be unjustifiable, given the late stage of the proceedings, and length of Mr. Bemba's incarceration to date. Having been arrested on 24 May 2008, Mr. Bemba's right to an expeditious trial would be illusory, should the trial against him commence over seven years after he was first imprisoned.

31. The right to an effective remedy is, however, an absolute right. The greatly reduced range of remedial options available to the Chamber cannot be held against the accused. In the present circumstances, the only appropriate and available remedy for the Prosecution's non-disclosure is a stay of the proceedings.

32. A stay of proceedings as a remedy for non-disclosure has been recognised at both the ICC,⁴⁰ and the international tribunals.⁴¹ While a drastic remedy, the obligation to disclose has been recognised as being important as the obligation to prosecute, and that compliance with these obligations are essential to a fair trial.⁴² At the ICC, the Appeals Chamber has recognised that imposing a stay is appropriate in certain circumstances:⁴³

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of

³⁹ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on accused's motion for new trial for disclosure violations', 3 September 2012.

⁴⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1401, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008.

⁴¹ *Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-T, Judgement, 30 September 2011, para.143.

⁴² *Ndindabahizi v. Prosecutor*, ICTR-01-71-A, Judgement 16 January 2007, para.72; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, paras. 183, 242; *Prosecutor v. Brņanin*, 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; *Prosecutor v. Karemera et. al.*, ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 9

⁴³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 39.

Appeal in *Huang v. Secretary of State*, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

33. The present situation is analogous to that in *Lubanga*, where Trial Chamber ordered a stay of proceedings after the Prosecution's non-disclosure of a significant body of exculpatory evidence inhibited the accused's opportunities to prepare his defence.⁴⁴ There was 'no prospect' that the deficiencies would be corrected.⁴⁵ The Trial Chamber held:⁴⁶

It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified.

34. There is no prospect of the prejudice caused by the Prosecution's non-disclosure now being remedied. The Prosecution allowed the Defence case to run to completion, without bringing the Material to light. Nor was it disclosed during the briefing period, or prior to closing arguments. The opportunity to rely on, investigate, or alter the structure and composition of the Defence case on the basis of the Material, has been irretrievably lost. A stay of proceedings is the only feasible path to remedying the Prosecution's breach of its obligations.

35. A stay of proceedings finds further support in the fact that the Prosecution has created a situation which is incompatible with accused's right to an expeditious resolution of his case. The Defence is now under an obligation to perform further investigations and enquiries in light of the information contained in the newly-disclosed Material. These investigations, however, would likely entail the need for further assistance from the Chamber, requests for the admission of further evidence, and would jeopardise the timeliness of the delivery of the judgement. In these circumstances, a stay of proceedings is warranted.

⁴⁴ ICC-01/04-01/06-1401, para. 92 (ii).

⁴⁵ ICC-01/04-01/06-1401, para. 91.

⁴⁶ ICC-01/04-01/06-1401, para. 91.

(iv) Further disclosure

36. In addition to the remedy sought above, the Defence also seizes the Chamber with a request for further disclosure of material relevant to the preparation of the Defence.

37. The disclosure of the Material gives rise to a reasonable belief that other similar information in the possession of the Prosecution remains undisclosed. On this point, the Chamber should be aware that it appears that the disclosure of the Material on 8 June 2015 was prompted solely by the fact that the Prosecution wishes to rely on the Material in the upcoming trial in the Article 70 Case. The Prosecution disclosed the Material to the accused in the Article 70 Case on 4 June 2015. Knowing that this disclosure would make the materials available to the Defence in these proceedings, it had no choice but to disclose the Material in the present case, which was done four days later on 8 June 2015.

38. In the Defence submission, there will inevitably be material *eiusdem generis* to that which was disclosed on 8 June 2015, arising from the Prosecution's investigations into Defence witnesses - irrelevant to the Article 70 Case - that remain undisclosed. In fact, in the Defence submission, it is almost impossible that the entire Prosecution investigation into the credibility of Defence witnesses consisted of a single interview with P-31, and a further interview with P-07. If, as the Defence now knows, the Prosecution travelled to [REDACTED] in August 2012 to interview P-31 to investigate the credibility of Defence witnesses, then it would follow that the Prosecution made the same enquiries of P-151, also based in [REDACTED].⁴⁷ Nor would any diligent prosecutor have failed to interview its Congolese witnesses P-45, P-44, P-36 and P-15 about their acquaintances and former (or present) colleagues who appeared on the Defence list of witnesses. The disclosures of 8 June 2015 are thus likely only to be the "tip of the iceberg".

39. Nor can it be ruled out that the information gathered during these interviews was, in fact, exculpatory and could well have assisted the Defence in rebutting aspects of the Prosecution case. In March 2014, in response to a further request for disclosure, the Prosecution Senior Trial Attorney, Mr. Badibanga admitted to the Defence that '[t]he Prosecution carried out routine investigations during the course of the Defence case, as you might expect'.⁴⁸

⁴⁷ P-151, T-172-Conf-ENG-ET, p.7, line 25.

⁴⁸ ICC-01/05-01/08-3016-AnxB-Red.

40. In fact the Defence did have such an expectation, and as such was diligent in requesting that these documents be disclosed contemporaneously, during the Defence case, and beyond.⁴⁹ Immediately following the commencement of the Defence case on 17 August 2012, in response to the Prosecution's late disclosure of documents for use with the Defence military expert, the Defence seized the Chamber with a request to order:⁵⁰

[REDACTED].

41. In opposing this request, the Prosecution responded that it had 'acted in accordance with its obligations from the outset and continue[d] to meet those obligations'.⁵¹ As is only now clear, 3 weeks prior to making this statement, on 2 August 2012, the Prosecution had interviewed P-31, 'to make inquiries about any possible credibility issues of those [REDACTED] who are Defense witnesses who may be known to CAR-OTP-P-0031',⁵² and knowingly kept this from the Defence and the Chamber.

42. In February 2014, the Defence wrote to the Prosecution seeking disclosure of the Prosecution's October 2012 interview with P-07, which now forms part of the Material. The letter stated as follows:⁵³

In the same filing, the Prosecution further stated that:

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

[...] Since any transcripts, minutes, or statements engendered by this meeting predated the Article 70 investigation and appear to have been collected pursuant to the Prosecution's investigation into the Defence case, I further request that the Prosecution disclose them to the

⁴⁹ [REDACTED].

⁵⁰ Defence Motion Regarding Prosecution Disclosure, 17 August 2012, ICC-01/05-01/08-2269-Conf, para. 21.

⁵¹ Prosecution Response to 'Defence Motion Regarding Prosecution Disclosure', 23 August 2012, ICC-01/05-01/08-2283-Conf, para. 15.

⁵² CAR-OTP-0084-0079-R01.

⁵³ ICC-01/05-01/08-3020-AnxB-Red, Letter Defecce to Mr. Badibanga, 20 February 2014, pp.3-4.

Defence immediately, and provide an explanation as to why they were not disclosed at an earlier juncture pursuant to Rule 77.

43. The Prosecution refused. The Defence then filed a Motion for Disclosure with the Chamber,⁵⁴ which was opposed by the Prosecution on the basis that the Defence request was ‘manifestly outside the scope of the Bemba case and impermissibly seeks to intrude into the record and evidence of a separate case.’⁵⁵ Having now reviewed the Material, it is clear that not only was P-07’s October 2012 interview report generated during the course of the Prosecution’s preparation in the present proceedings, it was also material to the preparation of the Defence, and should have been disclosed at the time.

44. In March 2014, the Defence wrote to the Prosecution in the following terms, seeking disclosure of information concerning Defence witnesses in the present proceedings:⁵⁶

In your email response of 3 March 2014, you simply responded that the requested information is “pertinent to the Article 70 case”, and invited me to address the Trial Chamber with a formal filing.

The fact that the requested information might be “pertinent to the Article 70” case is not a valid basis for refusing to disclose it. In the absence of a specific Court order on non-disclosure, the Prosecution must disclose any information, which is material to the preparation of the Defence. Information concerning Defence witnesses is clearly and irrefutably material to the preparation of the Defence.

45. The Chamber has previously held, following declarations by the Prosecution that they remained in compliance with their disclosure obligations that ‘[a]t this stage, the Chamber has no reason to doubt this assertion.’ In the submission of the Defence, the 8 June 2015 disclosure of the Material obliges the Chamber to look behind the Prosecution’s proclamations of compliance, and take steps to ensure that it complies with its own duty to ensure that the Prosecution fulfills its disclosure obligations.⁵⁷ The Prosecution can no longer be taken at its word.

46. A Trial Chamber’s ‘duty to ensure that the prosecution fulfills its disclosure obligations’⁵⁸ subsists after the end of the Defence case. The Chamber has previously

⁵⁴ ICC-01/05-01/08-3020-Red.

⁵⁵ ICC-01/05-01/08-3039, para. 10.

⁵⁶ ICC-01/05-01/08-3016-AnxB-Red, p.28.

⁵⁷ ICC-01/05-01/08-2292, para. 7

⁵⁸ ICC-01/05-01/08-2292, para. 7

ordered the prosecution to disclose to the Defence items related to a Defence witness even after the completion of his oral testimony, as they were found to be material to the preparation of the defence within the terms of Rule 77 of the Rules.⁵⁹ As such, the late stage of the proceedings does not release the Prosecution from its disclosure obligations, nor does it render the disclosure irrelevant to the overall fairness of the trial.

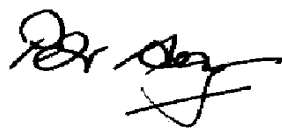
D. RELIEF REQUESTED

47. Based on the above submissions, the Defence accordingly requests that the Chamber:

ORDER the Prosecution to review its archives and disclose all material which is material to the preparation of the defence, including but not limited to that material generated during the course of its investigations into the credibility of Defence witnesses; and

ORDER a stay of proceedings; or, in the alternative

REMAIN SEIZED of the matter in terms of forthcoming Defence requests for investigative assistance, delay of delivery of the Judgement in the present case, and admission of materials generated from investigations into the information contained in the Prosecution's delayed disclosure.



Peter Haynes

Lead Counsel of Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

19 June 2015

⁵⁹ ICC-01/05-01/08-3070, para. 23, citing ICC-01/05-01/08-1594-Conf, para. 27.