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TRIAL CHAMBER III

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
*IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO***

**Public Redacted Document
with
Confidential Annexes A and B**

**Public Redacted Version of “Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’”, 13 July 2015,
ICC-01/05-01/08-3265-Conf**

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. The latest Defence attempt to permanently stop these proceedings and “delay delivery of the Judgment” fails to meet the high threshold for a stay of proceedings.¹ Filed just two days after the Trial Chamber III (“Chamber”) rejected a request to stay the proceedings for abuse of process,² the Defence now advances similarly unfounded claims that two recently disclosed investigator’s reports purportedly contain significant information about the credibility of Defence witnesses, pursuant to rule 77 of the Rules of Procedure and Evidence.³ The Defence Application fails on the law and facts, and should be summarily dismissed.

2. The record shows that the Office of the Prosecutor (“Prosecution”) disclosed significant and considerable evidence regarding the credibility of Defence witnesses at the beginning of, and continuously throughout, the Defence case. Furthermore, the Prosecution’s examination of Defence witnesses sufficiently informed the Defence of the credibility challenges affecting its witnesses. In light of the material disclosed during the Defence case, the information at issue is either not new, amounts to mere opinion, or is at best insignificant lead information.

3. The Defence alleges that earlier disclosure of this information would have led to a better selection and presentation of Defence witnesses “whose evidence would have been harder to impeach and more likely to be accepted by the Trial Chamber during its deliberations.”⁴ However, this assertion is speculative. It also fails to account for the more compelling and objective information about the credibility of Defence witnesses timely provided to the Defence through disclosure and witness examination, as well as independent Defence strategy and selection of witnesses.

¹ ICC-01/05-01/08-3257-Conf, para.47 (“Defence Application”).

² ICC-01/05-01/08-3255.

³ ICC-01/05-01/08-3257-Conf, paras.3-5, and 47.

⁴ ICC-01/05-01/08-3257-Conf, paras.24 and 30.

4. Even if the Chamber were to find the information at issue material to the assessment of witness credibility, the Defence has failed to demonstrate prejudice. Considering the totality and nature of the information disclosed by the Prosecution, the information at issue cannot significantly assist the Defence in better appreciating the credibility challenges to its own witnesses.

5. The Prosecution has a right to a fair trial.⁵ Trials are fair when proceedings are not subject to interference. A crucial factor, which the Defence avoids, is that the Prosecution's investigations into witness bribery and coaching resulted in evidence supporting the alleged criminality of persons including former lead counsel, case manager, and the Accused in this case.⁶ This cannot be reconciled with a prior intention, as the Defence now contends, to put reliable and credible evidence before the Chamber. The Defence must remain professionally accountable for its witness selection and case presentation.

6. Moreover, under the guise of rule 77, the Defence requests disclosure of essentially all material generated during the course of the Prosecution's investigations into the Defence case.⁷ The Prosecution's disclosure obligations are not unlimited. Rule 77 material is only disclosable if it undermines Prosecution evidence, supports a line of Defence argument, or significantly assists the Accused in understanding issues such as witness credibility.⁸ The Prosecution has complied with rule 77, which contemplates its ongoing disclosure obligation based on a case-by-case assessment of the totality of the information in its possession. The Defence makes no showing to the contrary, let alone of any (material) prejudice. In any event, Defence counsel must account for their own strategic decisions and selection of trial witnesses.

⁵ The Prosecutor v. *Callixte Kalimanzira*, Case No. ICTR-05-88-A, Appeal Judgement, 20 October 2010, para.34; The Prosecutor v. *Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Appeal Judgement, para. 69 (quoting Tadić Appeal Judgement, para.48).

⁶ ICC-01/05-01/13-749.

⁷ ICC-01/05-01/08-3257-Conf, paras.36 and 47.

⁸ ICC-01/05-01/08-1594-Conf, para.21.

II. Request for Confidentiality

7. Pursuant to regulation 23(2)*bis* of the Regulations of the Court, the Prosecution requests that this document and annexes A and B be received as “Confidential” as it responds to the Defence Application, which bears the same classification.

III. Submissions

a) The Prosecution has complied with its ongoing rule 77 disclosure obligations

8. The Prosecution has complied with its disclosure obligations fairly and in good faith throughout this case. Based on extensive searches of the information within its possession and control, including investigators’ reports and witness management databases, the Prosecution disclosed over 4,700 items as rule 77 material.

9. The Defence’s claim that, “[t]he Prosecution in the present case has developed a practice of systematically failing to meet it[s] disclosure obligations, particularly the disclosure of materials pursuant to Rule 77 of the Rules of Procedure and Evidence”⁹ is unfounded. The Defence grounds this inaccurate factual contention on discrete occasions where the Chamber ordered disclosure following the Prosecution’s request for guidance,¹⁰ or partially granted a Defence request.¹¹ The Defence deliberately disregards the Chamber’s rejection of prior Defence attempts to expand the scope of the Prosecution’s disclosure obligations under the guise of rule 77.¹² The Prosecution disclosed significant information placing the Defence on notice of the credibility challenges to Defence witnesses. Specifically, between July 2012 and mid-November 2013, during the Defence case, the Prosecution disclosed over 2,000 pages of rule 77 material.¹³ The Defence cannot seriously contend that the Prosecution deprived it of an opportunity to consider significant information.¹⁴

⁹ ICC-01/05-01/08-3257-Conf, para.1.

¹⁰ See, for example, [REDACTED]. See, also, article 67(2) of the Rome Statute which stipulates that “[i]n case of doubt as to the application of this paragraph [disclosure of potentially exculpatory material], the Court shall decide.”

¹¹ See, ICC-01/05-01/08-3070.

¹² See, for example, [REDACTED]; ICC-01/05-01/08-3100, paras.14, 20, 22, and 29; ICC-01/05-01/08-2292.

¹³ See, disclosure batches 61 to 78.

¹⁴ ICC-01/05-01/08-3257-Conf, para.7.

10. During the Defence case and prior to the testimonies of Defence witnesses, the Prosecution also disclosed information pertaining to their credibility, such as screening notes,¹⁵ investigator's reports,¹⁶ prior statements,¹⁷ witness statements and annexes regarding Defence evidence,¹⁸ allegations of [REDACTED],¹⁹ and prior criminal records.²⁰

11. These items, regarding Defence witnesses and evidence, were identified based on extensive searches conducted throughout the Prosecution's collections, including the evidence collection of other situations,²¹ as well as information specially collected during investigations into the Defence case (such as open source material). For example, on 8 October 2012, the Prosecution's disclosure of rule 77 material included 41 documents about Defence witnesses from the Democratic Republic of the Congo ("DRC"), Ugandan, and Kenyan situations.

b) The scope of rule 77 material is broad but not unlimited

12. The Prosecution's rule 77 disclosure obligations require a case-by-case assessment of the available information. The Chamber has repeatedly held that, "[a]n item will be considered material for Rule 77 purposes only if it is 'relevant for the preparation of the defence' in the sense that it would 'undermine the prosecution case or support a line of argument of the defence' or 'significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case' ('rule 77 Test')." ²² The Chamber thus ordered limited disclosure of evidence generated directly from Prosecution contact with Defence witnesses, which was collected after the close of the Defence case as

¹⁵ See, for example, CAR-OTP-0007-0061; CAR-OTP-0007-0064.

¹⁶ See, for example, CAR-OTP-0008-0354.

¹⁷ See, for example, CAR-OTP-0054-0005; CAR-OTP-0054-0019.

¹⁸ See, for example, CAR-OTP-0069-0010; CAR-OTP-0069-0043; CAR-OTP-0069-0045; and CAR-OTP-0069-0083.

¹⁹ [REDACTED]; and [REDACTED]; see, ICC-01/05-01/08-T-344-CONF-ENG ET, p.77, ln.1 to p.81, ln.24.

²⁰ See, for example, CAR-OTP-0073-0623; CAR-OTP-0073-0624; CAR-OTP-0073-0627; CAR-OTP-0069-0271; CAR-OTP-0029-0010 at 0111; and CAR-OTP-0029-0266.

²¹ See, Trial Rule 77 Package 16 08 October 2012.

²² ICC-01/05-01/08-1594-Conf, para.21 citing ICC-01/04-01/06-2624, para.16; and ICC-01/05-01/08-3070, para.23. [Emphasis added]

part of investigations into offences against the administration of justice in the article 70 case (“ICC-01/05-01/13 case”).²³

13. The Defence’s efforts to expand the scope of rule 77 to encompass all information collected during investigations into the Defence case and about its witnesses is untenable. It further contradicts this Chamber’s previous holding that, the requirement under rule 77 “is not for the prosecution to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection; ...”²⁴ Not every information concerning an individual questioned about the Defence case or who mentions a Defence witness is automatically disclosable. This was confirmed by the Chamber’s ruling that “given the broad scope of the prosecution’s investigations in the *Bemba* case, the Chamber finds that the defence does not adequately demonstrate the *prima facie* materiality of *all* ‘information concerning requests for assistance directed to the DRC, which pertain to the Defence case.’”²⁵ The Chamber also rejected the Defence request for information about the circumstances of the Prosecution’s contact with Defence witnesses (including information concerning an anonymous informant by extension).²⁶

14. Similarly, the Chamber rejected the Defence request for disclosure of “any and all” exculpatory materials related to Mr Arido disclosed in the ICC-01/05-01/13 case.²⁷ The Chamber’s rejection of previous requests shows that the Defence is not entitled to everything that was gathered from investigations into its case,²⁸ but instead must meet the rule 77 Test.

c) The Prosecution’s determination should be based on all available information

15. The Prosecution has disclosed rule 77 material, *inter alia*, on the basis of Defence requests or simply out of an abundance of caution regardless of the Prosecution’s own assessment. Additionally, the Prosecution’s decision not to rely on incriminating or other

²³ ICC-01/05-01/08-3070, paras.22-25.

²⁴ ICC-01/05-01/08-632, para.20. [Emphasis added]

²⁵ ICC-01/05-01/08-3100, para.29.

²⁶ ICC-01/05-01/08-3100, paras.27-28.

²⁷ ICC-01/05-01/08-3100, paras.40-42.

²⁸ *See*, for example, ICC-01/05-01/08-3100, paras.14, 20, 22, and 29.

supporting information does not automatically make that information material to Defence preparation.

16. The Prosecution must exercise its judgment as to what information is material to Defence preparation “on the basis of all the available information, and including anything revealed to the accused.”²⁹ The Prosecution’s enquiries into the Defence case, at times, resulted in investigative leads for the Prosecution’s article 70 investigations. This investigation implicated former members of the Defence team (lead counsel and case manager) and the Accused to whom the information at issue would be disclosed to. This is critical. The Prosecution had strong grounds to believe the veracity of the information collected. This is supported by the independent assessment of the Pre-Trial Chamber II (“PTC II”), which found substantial grounds to believe these allegations and committed the case to trial.³⁰

17. The general issue of non-disclosure of article 70 information in this case has been litigated before the Chamber and is now *res judicata*.³¹ The Prosecution chose not to rely on or disclose article 70 material solely to preserve the integrity of the article 70 investigation. Such an investigation was itself fundamental to the integrity of proceedings before the Court and this Chamber. Contrary to the Defence contention that disclosure would have resulted in better witness selection and evidence presentation, the disclosure of such material would have allowed counter measures capable of undermining the entire article 70 investigation. The decision to delay the disclosure of limited information was based on, *inter alia*, strong indications that some members of the Defence team and the Accused were well aware of the credibility challenges due to their alleged involvement in a wide witness corruption scheme involving some Defence witnesses. In these circumstances, the Defence makes no showing that the Prosecution violated its disclosure obligations or caused it any (material) prejudice with regard to the P-31 and P-7 reports.

²⁹ ICC-01/05-01/08-632, para.20.

³⁰ ICC-01/05-01/13-749.

³¹ ICC-01/05-01/08-3255, paras.83-87.

d) The two investigator's reports at issue

18. The P-31 report does not contain new or significant information that will assist the Accused, while the P-7 report merely contains mere opinion or insignificant lead information considering the Prosecution's disclosures and witness cross-examination.

i. The P-31 report does not contain new or significant information

19. As P-31 was a Prosecution witness, the report falls outside the scope of the Chamber's disclosure decision regarding material generated from contact with Defence witnesses.³² Moreover, since [REDACTED] did not testify for the Defence, the information at issue only relates to witnesses D-51, D-57, and CHM-1.³³ Even taken at its highest, this report cannot be characterised as material to Defence preparation because it does not meet the rule 77 Test.³⁴ The Prosecution's timely disclosure provided concrete and more compelling information squarely challenging the credibility of these same Defence witnesses.

20. The Prosecution disclosed information similar in content to the P-31 report. Considering the material disclosed regarding D-51 and D-57, the information at issue is either insignificant lead information or mere opinion.³⁵ As with all summary statements provided by the Defence, D-51's contained only [REDACTED].³⁶

21. The P-31 report states that D-51 [REDACTED].³⁷ The Prosecution disclosed information about, *inter alia*, [REDACTED],³⁸ [REDACTED],³⁹ [REDACTED].⁴⁰ The Defence wilfully disregarded this significant information affecting D-51's credibility.

³² ICC-01/05-01/08-3070, para.25.

³³ CAR-OTP-0084-0079_R01.

³⁴ CAR-OTP-0084-0079_R01. See, also, ICC-01/05-01/08-3257-Conf, paras.4-6. The Defence Application does not refer to information that undermines the Prosecution case; it only engages the two latter prongs of the rule 77 Test.

³⁵ The French text of rule 77 refers to information that is "*nécessaires*" for the preparation of the Defence. See, also, ICC-01/05-01/08-3257-Conf, para.15: Defence Application refers to the ICC Appeals Chamber favourably citing the Celebici decision, 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 ..." [Emphasis added].

³⁶ CAR-D04-0003-0194.

³⁷ CAR-OTP-0084-0079_R01 at 0081.

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ CAR-OTP-0069-0271; ICC-01/05-01/08-T-262-CONF-ENG ET, p.31, lns.6-21; ICC-01/05-01/08-T-262-CONF-ENG ET p.32, lns.1-25.

Moreover, D-51 stated in court that [REDACTED].⁴¹ The Defence was on notice of these credibility challenges.

22. The Prosecution disclosed screening notes of two meetings conducted with D-57 in 2008.⁴² The notes contain similar and more relevant information than the P-31 report or Defence summary statement of P-57.⁴³ This includes [REDACTED].⁴⁴ These notes were disclosed prior to D-57's testimony and tested in court. The only "new" information in P-31's investigator's report is that D-57 was [REDACTED].⁴⁵ This is insignificant to understanding D-57's credibility.

23. In relation to [REDACTED] ("CHM-1"), the P-31 report states that "[REDACTED]"⁴⁶ P-31 then provided [REDACTED], which are redacted. Yet, the Defence qualifies the information regarding CHM-1 as rule 77, asserting that it also refers to relevant background and credibility information.⁴⁷ This is incorrect. In any event, the Prosecution previously disclosed two witness statements of CHM-1 on 9 November 2009⁴⁸ and 6 September 2012,⁴⁹ containing the same information. Nonetheless, the Defence states that earlier disclosure of such information would have led to a review of its witness selection, additional investigations, replacement or corroboration of proposed witness testimonies.⁵⁰

24. In sum, despite the substantive and compelling information disclosed by the Prosecution, the Defence now contends that, "[t]he 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."⁵¹ This is simply a veiled attempt to both abrogate responsibility for Defence witness selection and case presentation, and to test the possibility of a second attempt to bolster the Defence case. Such an approach cannot succeed.

⁴¹ ICC-01/05-01/08-T-261-CONF-ENG ET, p.14, lns.6-7, p.25, lns.6-9.

⁴² CAR-OTP-0007-0064; and CAR-OTP-0007-0061.

⁴³ See, CAR-OTP-0084-0079_R01 and CAR-D04-0003-0190.

⁴⁴ CAR-OTP-0007-0064; and CAR-OTP-0007-0061.

⁴⁵ CAR-OTP-0084-0079_R01 at 0081.

⁴⁶ CAR-OTP-0084-0079_R01 at 0081.

⁴⁷ ICC-01/05-01/08-3257-Conf, para.4.

⁴⁸ CAR-OTP-0008-0219 in Disclosure Pre-Trial Batch 21.

⁴⁹ CAR-OTP-0069-0010, CAR-OTP-0069-0043, and CAR-OTP-0069-0045 in Disclosure Trial Batch 62.

⁵⁰ ICC-01/05-01/08-3257-Conf, para.20.

⁵¹ ICC-01/05-01/08-3257-Conf, para.20.

ii. Prosecution Witness 7 (“P-7”) provided article 70 lead information

25. The P-7 report relates to contact with a Prosecution witness. In mid-June 2012, the Prosecution received leads from an anonymous informant stating that a member of the Defence team, with the help of [REDACTED], had bribed some witnesses who were not in Bangui during the 2002-2003 conflict in the CAR to provide false testimony in the *Bemba* case.⁵² Although the Prosecution’s meeting with P-7 in October 2012 began within the context of Defence witness credibility, the leads gathered were pertinent to the article 70 investigation particularly regarding D-23 and D-26. P-7 stated that [REDACTED] who, based on lead information from the anonymous informant, was implicated in the article 70 investigations.

26. The P-7 report contains insignificant general opinion, such as [REDACTED]⁵³ [REDACTED]. The Defence claims that the P-7 report contains relevant information about [REDACTED], which is a key component of the Defence case.⁵⁴ P-7’s information is insignificant and does not support the Defence argument. He stated that [REDACTED].⁵⁵ In fact, contrary to Defence argument that [REDACTED]⁵⁶ P-7 stated that [REDACTED].⁵⁷

27. More importantly, this information was already known to the Defence prior to D-64’s testimony.⁵⁸ D-60 provided sworn testimony about more detailed information regarding [REDACTED]⁵⁹ As such, the Defence knew this information from its own witness. If indeed this issue was “a key component of the Defence case”,⁶⁰ then the Defence should have taken appropriate investigations or measures following D-60’s testimony. It did not.

⁵² ICC-01/05-44-Red, Public Redacted version of “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70”, 3 May 2013, ICC-01/05-44-Conf-Exp, paras.9-11.

⁵³ CAR-OTP-0072-0476: see, D-4 (at 0479); D-6, D-8, D-9, D-10, D-50, and D-55 (at 0480).

⁵⁴ ICC-01/05-01/08-3257-Conf, para.5.

⁵⁵ CAR-OTP-0072-0476 at 0480-0481.

⁵⁶ ICC-01/05-01/08-T-259-CONF-ENG CT, p.10, ln.5 to p.11, ln.1.

⁵⁷ CAR-OTP-0072-0476 at 0481.

⁵⁸ See, [REDACTED]; and [REDACTED].

⁵⁹ See, [REDACTED].

⁶⁰ ICC-01/05-01/08-3257-Conf, para.5.

28. The Defence Application does not even particularise the information regarding D-64. P-7 mentioned, generally, that D-64 [REDACTED].⁶¹ This is insignificant. Moreover, [REDACTED],⁶² which was triggered by a Defence request.⁶³ Thus the Defence were sufficiently aware of possible credibility challenges affecting D-64 during trial.

29. The information regarding D-23, [REDACTED], falls squarely within the article 70 investigation.⁶⁴ The Prosecution's questioning of D-23 was based on open-ended and standard questions, which is similar to routine questions used by both Parties throughout this trial. For example, Mr Haynes posed similar questions to Prosecution Witness 213 to elicit his knowledge about [REDACTED].⁶⁵ The Prosecution did not refer to, or particularise, any undisclosed information.⁶⁶ The Chamber previously held that, "the Prosecution put only open-ended questions to Defence witnesses regarding issues affecting credibility – without particularising allegations or presenting or referring to the undisclosed information – on which the Defence was not precluded from following up by a lack of information."⁶⁷

30. Moreover, P-7's character is irrelevant to the present proceedings and thus the Defence has not suffered any prejudice by not examining or investigating his character.⁶⁸ The Chamber has repeatedly stated that its assessment of Defence witnesses and evidence will be based on the trial record.⁶⁹ The Defence concerns regarding the credibility of its witnesses should have been evident during the trial proceedings based on the trial record.

31. P-7 stated that [REDACTED].⁷⁰ This lead information was important for the article 70 investigation. The remaining information concerned allegations that [REDACTED].⁷¹ Prior to D-26's testimony, the Prosecution disclosed three documents containing substantive

⁶¹ CAR-OTP-0072-0476 at 0477-0478.

⁶² ICC-01/05-01/08-2354-Conf; ICC-01/05-01/08-T-260-CONF-ENG ET, 23 October 2012, p.1,ln.19 to p.2, ln.13.

⁶³ ICC-01/05-01/08-2340-Conf, para.8.

⁶⁴ CAR-OTP-0072-0476 at 0479.

⁶⁵ [REDACTED].

⁶⁶ ICC-01/05-01/08-3255, paras.83-87.

⁶⁷ ICC-01/05-01/08-3255, paras.83-87.

⁶⁸ ICC-01/05-01/08-3257-Conf, para.24.

⁶⁹ ICC-01/05-01/08-3255, para.88.

⁷⁰ CAR-OTP-0072-0476 at 0480. [REDACTED]; CAR-D04-0003-0170 at 0170.

⁷¹ CAR-OTP-0072-0476 at 0480.

information from [REDACTED].⁷² The Defence was on sufficient notice regarding D-26's credibility challenges as he was also questioned about this in court. All three documents were subsequently admitted into evidence following submissions by both Parties.

e) The Defence has not suffered prejudice

32. Even if the Chamber were to find that information in the P-7 report contained information material to the Defence's preparation, the Defence has not suffered prejudice as a result of the delayed disclosure. By 19 March 2014, the Defence was aware of the 12 October 2012 meeting where a witness provided information about the witness corruption scheme, specifically stating that [REDACTED].⁷³

33. A redacted extract of the P-7 report, referring to D-23 and D-26, was disclosed to Mr Bemba in the ICC-01/05-01/13 case on 16 January 2014 – over 17 months ago.⁷⁴ Moreover, the entire P-7 report with limited redactions to P-7's identity was also disclosed in that case on 27 June 2014 – over a year ago.⁷⁵ As this Chamber and the Single Judge of PTC II noted, nothing stops Mr Bemba from sharing the information disclosed in the ICC-01/05-01/13 case with his Defence in this case and therefore “both the accused and his counsel in the present proceedings should have already been given access to them”.⁷⁶ In addition, members of the Defence team as presently constituted (for example one counsel⁷⁷ and case managers) work on both this case and the ICC-01/05-01/13 case. Thus, considering the alleged importance placed on the 12 October 2012 meeting, which the Defence was specifically aware of at least from 20 February 2014,⁷⁸ the Defence could have had access to the same information over 15 months ago. It chose not to do so.

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ See, Annex B, CAR-OTP-0072-0486-R01 disclosed in Pre-Confirmation Package 2.

⁷⁵ See, CAR-OTP-0072-0476-R01 disclosed in Pre-Confirmation Package 16.

⁷⁶ ICC-01/05-01/08-3070, para.26, ICC-01/05-01/13-338.

⁷⁷ Mr Bemba's first counsel in the ICC-01/05-01/13 Case, Nick Kaufman, was a member of the Defence team in this case since the confirmation of charges hearing. As far as the Prosecution is aware, he has not been removed from the main case. Ms Taylor replaced Mr Kaufman as lead counsel in the ICC-01/05-01/13 Case, while reporting to Mr Peter Haynes (lead counsel in the main case).

⁷⁸ ICC-01/05-01/08-3257-Conf, para.6, fn.11 referring to ICC-01/05-01/08-3020-AnxB-Red wherein the Defence requested disclosure of the report concerning the 12 October 2012 meeting.

34. The Prosecution's disclosure, coupled with witness questioning in court, put the Defence on sufficient notice about its witnesses' credibility. At that stage, the Defence was under an obligation to bolster the credibility of its witnesses. It is too late in the day for the Defence to argue that it would have selected and presented different witnesses or conducted further investigations had it known of the duplicative or insignificant information in the two investigator's reports, when it failed to take the necessary steps based on more detailed information already in its possession. This is similar to a previous Defence attempt to abrogate responsibility for its professional conduct when it stated that [REDACTED].⁷⁹ In that regard, the Chamber concluded that the Defence's own submissions "belie the Defence's claim to have been "compelled" by disclosure violations on the part of the Prosecution [to abandon certain witnesses' testimony]."⁸⁰

35. Furthermore, the Defence approach towards significant credibility and reliability issues during the Defence case is best illustrated by its response to allegations of falsified documents ("allegedly fraudulent documents"). The Prosecution submitted documentary evidence, including signed witness statements [REDACTED], to demonstrate that the documents relied upon during the Defence case were falsified. The Defence stated, *inter alia*, that the Prosecution's allegations were based upon a number of false assertions.⁸¹ However, it provided no contrary evidence. Instead, it continued to rely on these documents even after [REDACTED] more than a year later. This witness rejected the documents under oath.⁸² Yet in spite of such compelling evidence, the Defence took no action. Instead, it requested the admission of these documents.⁸³

f) A stay of proceedings is not warranted

36. The Defence Application does not meet the high threshold for a stay of the proceedings. The Chamber recently recalled that the Defence failed to demonstrate that the Accused's right to a fair trial in this case "has been violated , prejudiced, or infringed such that it is 'impossible to piece together the constituent elements of a fair trial' and would be

⁷⁹ ICC-01/05-01/08-3121-Conf, paras.13-16 and 88.

⁸⁰ ICC-01/05-01/08-3255, paras.88-89.

⁸¹ ICC-01/05-01/08-2326-Conf, para.2.

⁸² See, for example, [REDACTED].

⁸³ ICC-01/05-01/08-2590-Conf-AnxA, pp.2-8.

“repugnant’ or ‘odious’ to the administration of justice to allow the case to continue”.⁸⁴ Similarly, the Chamber reiterated that “[n]ot every infraction of the law or breach of the rights of the Accused will justify a stay of proceedings.”⁸⁵ The information at issue was either disclosed to the Defence in another form, available in the trial record, or insignificant. It does not amount to (material) prejudice, let alone justify the “exceptional” and “drastic remedy” of a stay of proceedings.⁸⁶

g) The Defence request for further disclosure for ICC-01/05-01/13 case material is unfounded

37. The Defence seeks to expand the Prosecution’s disclosure obligation to cover all material generated during investigations into the Defence case or to equate it to obligations in the ICC-01/05-01/13 case.⁸⁷ Since January 2014, the Defence has sought disclosure of article 70 related material through multiple requests *via* emails to the Prosecution and filings to the Chamber. This material is not directly relevant to the charges in this case. The proper avenue for the Defence to seek all article 70 related material is from the Accused, who receives the relevant disclosure in that ICC-01/05-01/13 case.⁸⁸

38. This Chamber has distinguished between Defence submissions that may be relevant to the ICC-01/05-01/13 case and arguments supporting the materiality of the relevant information to Defence preparation in this case.⁸⁹ The Chamber held that, “while the allegations in case ICC-01/05-01/13 arise out of alleged offences against the administration of justice in the Bemba case, the issues central to the charges and the relevant materials are quite distinct. That the information may be material to the preparation of the defence in case ICC-01/05-01/13 does not automatically make such information subject to disclosure in the Bemba case. Any such assessment should be done on a case-by-case basis.”⁹⁰ Thus, not all information gathered during investigations into the Defence case or related to the ICC-01/05-01/13 case is disclosable in this case.

⁸⁴ ICC-01/05-01/08-3255, para.18

⁸⁵ ICC-01/05-01/08-3255, para.10

⁸⁶ ICC-01/05-01/08-3255, para.10

⁸⁷ See, for example, Annex A.

⁸⁸ ICC-01/05-01/08-3070, para.26; *see* ICC-01/05-01/13-338.

⁸⁹ ICC-01/05-01/08-3100, paras.27-28.

⁹⁰ ICC-01/05-01/08-3100, para.41.

39. The Defence approach would render rule 77 unlimited. Such a low threshold would automatically result in all material disclosed in the ICC-01/05-01/13 case regarding the alleged bribery and corruption of Defence witnesses being disclosed in this case. The only difference in disclosure obligations, therefore, would be limited to, for example, background information of other accused persons where this is not directly linked to the Defence witnesses. The effect would be continuously unlimited disclosure and based on unlimited criteria in tandem with the ICC-01/05-01/13 case and any ongoing investigations, rather than disclosure based on the rule 77 Test. This would negatively affect the fair and expeditious conduct of proceedings without the benefit of uncovering significant information that would advance the trial proceedings.

h) The Defence must remain professionally accountable for the conduct of its case

40. The Defence is accountable for its professional conduct and strategy and cannot be allowed to delay these proceedings indefinitely. Defence counsel are responsible for the conduct of their client's case.⁹¹ They are also officers of the Court and responsible for the integrity of evidence submitted to the Chamber.⁹² Their obligations include conducting minimum investigations to ensure that the evidence presented to the Chamber is reliable and credible; exercising personal judgment on trial issues, such as assessing and bolstering witness credibility and evidence; and acting expeditiously to avoid delays in the proceedings.⁹³ These responsibilities are separate from those of, and cannot be transferred to, the Prosecution.

41. The Defence must not be allowed to abrogate its professional duties when faced with undesirable results in order to seek a second chance to mount a full or partial Defence case. The liberty to choose how it conducts investigations and case selection carries responsibilities. As experienced counsel, both Mr Haynes and Ms Gibson knew that the

⁹¹ Code of Professional Conduct for Counsel, article 24(2).

⁹² Code of Professional Conduct for Counsel, articles 24(3) and 25(1).

⁹³ ICC-01/04-01/06-2192-Red, para.65: The Defence has a clear responsibility to avoid the delays that otherwise may well result from well-founded applications to adjourn, to enable investigation of defence material following a tardy approach to rule 78 of the Rules by the Accused.

credibility of Defence witnesses would be tested at trial.⁹⁴ They were part of the Defence team during its investigations and case presentation. The Defence had an obligation to ensure that its witnesses were credible and reliable, at a minimum, even prior to any disclosure or evidence testing in court.

42. The Defence is obliged to exercise a minimum level of due diligence with regard to the witnesses it presents to the Chamber.⁹⁵ The Defence had unimpeded access to its own witnesses who could have provided better information. Additionally, it had other sources (military and civilian) that could have provided information regarding its witnesses. Moreover, at a minimum, the Defence had access to the internet and could have conducted basic online searches as the Prosecution did. The Prosecution disclosed concrete and detailed information regarding witness credibility from internet sources; it put the Defence on sufficient notice simply by using google searches.

43. Furthermore, Defence counsel are obliged to exercise personal judgment on the substance and purpose of statements made and questions asked.⁹⁶ The Defence should put its case during trial and avoid unnecessary delays in the proceedings.⁹⁷ Following disclosure of significant witness credibility information, the Prosecution proceeded to examine witnesses using the documents disclosed. From that point onwards, the Defence was on further notice and could have attempted to bolster its evidence as the proceedings unfolded by, for example, re-examining the same witnesses and/or addressing the issues raised through subsequent witnesses or evidence.

⁹⁴ ICC-01/05-01/08-1023, para.13: During both phases of the trial, the party not calling the witness may ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as on mitigating and/or aggravating circumstances and reparation issues.

⁹⁵ Code of Professional Conduct for Counsel, articles 24(3) and 25(1).

⁹⁶ Code of Professional Conduct for Counsel, article 24(2).

⁹⁷ ICC-01/05-01/08-1086, para.22: The Prosecution submits that the Chamber has omitted to place an obligation on the opposing party “to put its case” to the witness. The fact that the Chamber's Decision is silent on this issue does not interfere with counsel's obligations in either presenting evidence or acting on behalf of the Accused pursuant to the Rules and in keeping with counsel's respective codes of conduct.

IV. Relief Sought

44. In light of the above, the Prosecution requests the Chamber to reject the Defence Application. It fails to demonstrate the requisite threshold for a stay of proceedings and it fails to justify its request for further disclosure.



Fatou Bensouda, Prosecutor

Dated this 20th Day of July 2015
At The Hague, The Netherlands