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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 disclosure of further material**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

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A. BACKGROUND

1. One of the consequences of the Prosecution's decision to conduct parallel proceedings in ICC-01/05-01/08 ("Main Case") and ICC-01/05-01/13 ("Article 70 Case") is that material continues to come to light in the Article 70 Case, which is disclosable in the Main Case.

2. The Defence has already brought several significant omissions to the attention of the Trial Chamber.¹

3. Further material has now emerged which also should, unquestionably, have been provided to the Defence during the course of the Main Case proceedings ("the Material"). For the purposes of the present request, the Material consists of the following:

(a) records of contact between the Prosecution and Defence witness D-55;²

(b) requests for assistance to state authorities ("RFAs") concerning Defence witnesses and Defence team members;³ and

¹ ICC-01/05-01/08-3257-Red; ICC-01/05-01/08-3264-Red2.

² CAR-OTP-0089-1332-R01.

³ CAR-OTP-0091-0351; CAR-OTP-0091-0360; CAR-OTP-0091-0371; CAR-OTP-0091-0380; CAR-OTP-0091-0385; CAR-OTP-0091-0410; CAR-OTP-0091-0419; CAR-OTP-0091-0437; CAR-OTP-0091-0439; CAR-OTP-0091-0444; CAR-OTP-0091-0445; CAR-OTP-0091-0449-R01; CAR-OTP-0091-0450; CAR-OTP-0091-0455; CAR-OTP-0091-0460-R01; CAR-OTP-0091-0465-R01; CAR-OTP-0091-0307-R01; CAR-OTP-0091-0312-R01; CAR-OTP-0091-0317-R01; CAR-OTP-0091-0320-R01; CAR-OTP-0091-0326-R01; CAR-OTP-0091-0331-R01; CAR-OTP-0091-0333-R01; CAR-OTP-0091-0469-R01; CAR-OTP-0091-0473-R01; CAR-OTP-0091-0477-R01; CAR-OTP-0091-0481-R01; CAR-OTP-0091-0486-R01; CAR-OTP-0091-0491-R01; CAR-OTP-0091-0496-R01; CAR-OTP-0091-0501-R01; CAR-OTP-0091-0677-R01; CAR-OTP-0091-0707-R01; CAR-OTP-0091-0344; CAR-OTP-0091-0339; CAR-OTP-0091-0539; CAR-OTP-0091-0546; CAR-OTP-0091-0551; CAR-OTP-0091-0556; CAR-OTP-0091-0561; CAR-OTP-0091-0566-R01; CAR-OTP-0091-0571-R01; CAR-OTP-0091-0576; CAR-OTP-0091-0583; CAR-OTP-0091-0588; CAR-OTP-0091-0594; CAR-OTP-0091-0599; CAR-OTP-0091-0604; CAR-OTP-0091-0679; CAR-OTP-0091-0683; CAR-OTP-0091-0511-R01; CAR-OTP-0091-0520-R01; CAR-OTP-0091-0529-R01; CAR-OTP-0091-0609; CAR-OTP-0091-0615-R01; CAR-OTP-0091-0620-R01; CAR-OTP-0091-0624-R01; CAR-OTP-0091-0629-R01; CAR-OTP-0091-0634-R01; CAR-OTP-0091-

- (c) material relating to the Prosecution's procurement of financial records from Western Union's Global Investigations Department.⁴

4. Some of the Material is already in the possession of the Defence, having been disclosed to Mr. Bemba in the Article 70 proceedings. The Prosecution, however, continues to have disclosure obligations which exist in the Main Case, which are patently not fulfilled by the disclosure of the material in the Article 70 Case. This is nowhere better demonstrated than by the Prosecution's previous and consistent practice of disclosing the same material in both the Article 70 case and the Main Case.⁵

5. Moreover, the Trial Chamber has recently re-emphasised that the existence of a document in the case file of one of the two cases does not necessarily entitle a party to rely on the document in the parallel case.⁶ The Article 70 Trial Chamber adopted the same position. Defence teams in the Article 70 Case, for example were not entitled to rely on documents concerning the Prosecution's payments to P-169 and P-178, despite having access to these documents, without formal disclosure by the Prosecution in the Article 70 Case.⁷ As such, the Prosecution cannot avoid its disclosure obligations in the present proceedings simply by disclosing material to an accused in different proceedings before an entirely different Trial Chamber.

0657-R01; CAR-OTP-0091-0662-R01; CAR-OTP-0091-0667-R01; CAR-OTP-0091-0672-R01; CAR-OTP-0091-0697-R01; CAR-OTP-0091-0701-R01.

⁴ CAR-OTP-0092-0018, CAR-OTP-0092-0021; CAR-OTP-0092-0022; CAR-OTP-0092-0027; CAR-OTP-0092-0028; CAR-OTP-0092-0033; CAR-OTP-0092-0035.

⁵ See ICC-01/05-01/08-3254-Conf-AnxA and ICC-01/05-01/13-984-Conf-AnxA and Conf-AnxB where the same 26 documents were disclosed to the Defence in Main Case on 6 June 2014 and in Article 70 on 4 June 2015; ICC-01/05-01/08-3262-Conf-AnxA and ICC-01/05-01/13-1042-Conf-AnxA where the same 3 documents were disclosed to the Defence in Main Case and in Article 70 on 26 June 2015; ICC-01/05-01/08-3278-Conf-AnxA and ICC-01/05-01/13-1117-Conf-AnxA and Conf-AnxB where the same 37 documents were disclosed to the Defence in Main Case and in Article 70 on 31 July 2015.

⁶ Email Trial Chamber to the Defence 'URGENT - Reclassification of Chamber's decision', 29 September 2015 at 14:09.

⁷ See ICC-01/05-01/13-1023-Conf; ICC-01/05-01/13-1030-Conf; ICC-01/05-01/13-1031-Conf; ICC-01/05-01/13-1154.

The accused is entitled to have the prejudice which arises in the Main Case from the Prosecution's non-disclosure of the Material acknowledged by the Main Case Trial Chamber, just as he is entitled to a remedy in these proceedings. The Prosecution cannot seek to avoid such a finding, or the issuance of an appropriate remedy, by refusing to disclose documents on the basis that they are already in the possession of the accused or his counsel.

6. As such, having not received the Material in the Main Case, the Defence approached the Prosecution directly with a reasoned request for its disclosure. The request also noted that the Material included a record of the Prosecution's contact with Defence witness D-55 ("CAR-OTP-0089-1332-R01"). However, the version of CAR-OTP-0089-1332-R01 disclosed in the Article 70 Case has redactions applied to the content of conversations between 2009 and 2013.⁸ As such, the Defence also asked for an un-redacted version of this document, as well as disclosure of all material generated during the course of the Prosecution's contact with D-55. The Prosecution was asked to provide the documents by the close of business on Wednesday, 11 November 2015.⁹

7. The Prosecution ignored the Defence deadline, and responded on Friday, 13 November 2015, as follows:¹⁰

As you rightly indicated in your email, your client is already in possession of the requested documents. Additionally, a member of your team, in her capacity as lead counsel of Mr Bemba in the Article 70 proceedings, has already received these documents. As you can cite the references of the aforesaid documents, it is our belief that you are also privy to them. We would like to remind you that:

- The TCIII did not join the two cases but rather instructed the parties not to introduce Article 70 evidence into the main case;

⁸ CAR-OTP-0089-1332-R01.

⁹ Email to Prosecution from Defence of 6 November 2015 at 16:15.

¹⁰ Email to Defence from Prosecution of 13 November 2015 at 10:10.

-The TCIII and the Single Judge both indicated in their respective decisions that Mr Bemba is entitled to share material he received with his counsels [*sic*].

We therefore believe that, if Mr Bemba deems it to be in his interest to introduce the requested documents in the main case, he can share with you the materials disclosed to him, or instruct Mrs Taylor to do so.

8. The Prosecution's email did not address the Defence request for the disclosure of all materials generated during the course of the Prosecution's contact with D-55, nor the provision of an unredacted version of CAR-OTP-0089-1332-R01,¹¹ neither of which have been disclosed in the Article 70 Case. Significantly, the Prosecution did not dispute the disclosability of the Material in the Main Case.

9. Citing the Prosecution's previous practice and ongoing disclosure obligations, the Defence asked that the Material be provided by close of business on Monday, 16 November 2015. Having not received a response, the Defence has no option but to seize the Trial Chamber in order to compel disclosure of the Material by the present filing.

B. APPLICABLE LAW

10. Rule 77 of the Rules of Procedure and Evidence requires the Prosecution to disclose all documents that are "material to the preparation of the defence".

11. This Trial Chamber has consistently confirmed the Appeals Chamber's finding that the Prosecution's disclosure obligations under Rule 77 should be interpreted broadly, so as to include documents that are not directly linked to exonerating or incriminating evidence.¹²

¹¹ CAR-OTP-0089-1332-R01.

¹² ICC-01/05-01/08-3167-Conf, para. 33 citing 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, paras. 6/20

12. Material generated from the Prosecution's contact with Defence witnesses,¹³ and the Prosecution's request for assistance to states issued during the course of their investigations¹⁴ have previously been found to be disclosable under Rule 77 of the Rules.

C. SUBMISSIONS

(a) Contact between the Prosecution and Defence Witness D-55

13. On 3 November 2015, the Prosecution disclosed CAR-OTP-0089-1332-R01 in the Article 70 Case, being a document called "[REDACTED]".¹⁵ CAR-OTP-0089-1332-R01 consists of summaries, set out in tabular form, of the Prosecution's contact with D-55. It demonstrates that Prosecution contact with D-55 occurred *inter alia*, on 17 November 2009, 7 June 2013, and 12 December 2013. The content of these conversations has been redacted from the version disclosed in the Article 70 Case. None of the material generated from these contacts has previously been disclosed to the Defence.

14. The Prosecution was aware it was required to disclose its contact with D-55. In May 2014, the Trial Chamber clarified that material generated during the course of contacts between the Prosecution and Defence witnesses must be disclosed to the Defence under Rule 77 of the Rules of Procedure and Evidence.¹⁶

77-78; Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 38.

¹³ ICC-01/05-01/08-3070, para. 25.

¹⁴ ICC-01/04-01/06-3017, para. 11; ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275. In the *Katanga* case, pursuant to Rule 77, the Prosecution disclosed correspondence between OTP and DRC concerning the provision of evidence and assistance to the DRC; ICC-01/04-01/07-949, footnote 41.

¹⁵ CAR-OTP-0089-1332-R01.

¹⁶ ICC-01/05-01/08-3070, para. 25.

... the Chamber notes that the defence requests inspection of "all interview notes, statements, or transcripts of interviews" generated during the course of contacts between the prosecution and witnesses called by the defence in the Bemba case. The Chamber finds that, in principle, the Items generated during the course of contacts between prosecution and witnesses called by the defence may be material to the preparation of the defence. However, in general terms, "interview notes" fall within the scope of Rule 81(1) of the Rules. However, the Chamber has previously held in relation to screening notes or investigator's notes that the prosecution's duties within the scope of Article 67(2) of the Statute and Rule 77 of the Rules require fact specific decisions for each interview note or pre-interview assessment, and "critically the prosecution must ensure that if there has been a later formal statement all exculpatory material in the screening notes has been disclosed within the statement, along with any information that is material to defence preparation. If this had not occurred, the prosecution must disclose the screening notes, or the relevant information."

15. CAR-OTP-0089-1332-R01 is not an "interview note"; it is a log summarizing the details of conversations between the Prosecution and D-55. As such the Trial Chamber's decision provides no basis for non-disclosure to the Defence in the Main Case.

16. Moreover, the Trial Chamber's finding that items generated during the course of contacts between the Prosecution and Defence witnesses are in principle disclosable, was not revolutionary. It mirrored the previous jurisprudence of the Court.¹⁷ Most recently, the Trial Chamber in the *Ruto and Sang* case held that:¹⁸

the Chamber considers that the previous statements and any other material related to the two Defence witnesses are material to the preparation of the Defence. Accordingly, the material is subject to disclosure under Rule 77 of the Rules.

¹⁷ ICC-01/04-01/06-2624, para. 18.

¹⁸ ICC-01/09-01/11-840-Red, para. 11.

17. This reflects the position at the international criminal tribunals, where Chambers have consistently required the Prosecution to disclose any statements of Defence witnesses in their possession. The Trial Chambers in *Karemera et al*, *Kamuhanda*, *Zigiranyirazo* and the *Ngirabatware* cases, for example, were explicit that where the Prosecution interviewed Defence witnesses, their statements were material to the Defence and inspection should be allowed.¹⁹

18. The fact that the summaries of the conversations with D-55 exist in a “contact log” do not justify the non-disclosure of CAR-OTP-0089-1332-R01 to the Defence. As the ICC Appeals Chamber held in the *Banda & Jerbo* case, a Rule 76 statement should be defined broadly, and requires disclosure of prior statements irrespective of the form in which they are recorded.²⁰

19. Concrete prejudice arose from the non-disclosure of the material generated during the course of the Prosecution’s contact with D-55. Firstly, the Defence called a witness without having access to the prior records of the Prosecution’s contact with the very same individual. Secondly, on 12 February 2014, the Defence filed a motion on Prosecution contact with its witnesses.²¹ The Defence sought an order that the Prosecution disclose all interview notes, statements, or transcripts of interview generated during the course of its contact with Defence witnesses.

¹⁹ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor’s Interlocutory Appeal Concerning Disclosure Obligations*, 23 January 2008, paras. 14-16; *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda’s Motion for Disclosure of Witness Statements and Sanction of the Prosecutor*, 29 August 2002, para. 27; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirobera’s Motion for Inspection of Statement of Pierre Celestin Mbonankira*, 20 September 2007, para. 11; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence [...] Second Motion for Inspection of Materials in the Prosecution’s Custody*, 27 September 2011, para. 42; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules*, 21 February 2007.

²⁰ ICC-01/05-01/08-3167-Conf, para. 33.

²¹ ICC-01/05-01/08-2971-Red.

20. In its response, the Prosecution stated that:²²

The Prosecution **did not contact any Defence witness prior to the close of the Defence case**

21. CAR-OTP-0089-1332-R01 demonstrates that this submission was false. It shows that the Prosecution had contact with D-55 on 7 June 2013, prior to the close of the Defence case on 14 November 2013. Had the Prosecution disclosed CAR-OTP-0089-1332-R01 in a timely fashion, as well as all records of contact with this witness, the Defence would have been in a position to demonstrate to the Trial Chamber that the Prosecution's submissions were, in fact, untrue.

22. Accordingly, the Defence is entitled not only to see the records of contact with D-55 as of right, but also as a basis for further submissions to the Trial Chamber concerning the Prosecution's submissions that no such contact took place.

23. In addition, the Defence requests that the Prosecution be ordered to provide an unredacted version of CAR-OTP-0089-1332-R01, deleting the redactions that have been applied to the content of conversations between 2009 and 2013. The dates of this contact, and the redaction of this information in the Article 70 Case, give rise to the presumption that these conversations were, in fact, relevant to the Main Case and as such material to the preparation of the Defence. The Prosecution has asserted Rule 81(1) as the basis for concealing this information from the Defence teams in the Article 70 Case. While Rule 81(1) authorises the non-disclosure of internal working documents, entire conversation with a Defence witness during the Main Case could not plausibly fall within this exception. Rule 81(1) cannot be used as a basis for the non-disclosure of material which concerns

²² ICC-01/05-01/08-2990-Red, para. 17.

the credibility of Defence witnesses or which is otherwise material to the preparation of the Defence.

(b) Requests for Assistance

24. Through documents disclosed in the Article 70 Case, the Defence is now aware that the Prosecution approached numerous states for investigative assistance namely: Austria, Belgium, Cameroon, Democratic Republic of Congo, France, Germany, Ireland, Germany and Sweden. These requests generated “RFAs” which directly cited to and concerned Defence witnesses in the Main Case, and members of the Main Case Defence team itself.

25. The practice and jurisprudence of the ICC rendered the RFAs disclosable to the Defence under Rule 77 of the Rules of Procedure and Evidence.²³ In the *Lubanga* case, the Appeals Chamber ordered the disclosure of RFAs to the authorities of the DRC on the basis that they concerned a key issue in dispute between the parties. The Appeals Chamber held:²⁴

The Appeals Chamber notes that the RFA is a request for assistance from the Prosecutor to the DRC authorities, the response to which was provided in the Letter. The Appeals Chamber further observes that the Letter relates to the determination of the age of D-0040 and D-0041, which is a key issue in dispute in the pending appeal against the Conviction Decision. Therefore, the Appeals Chamber considers that the RFA is a document that is material to the preparation of the defence and falls under rule 77 of the Rules of Procedure and Evidence.

²³ ICC-01/04-01/06-3017, para. 11; ICC-01/04-01/10-47, para. 14; ICC-01/04-01/10-275. In the *Katanga* case, pursuant to Rule 77, the Prosecution disclosed correspondence between OTP and DRC concerning the provision of evidence and assistance to the DRC; ICC-01/04-01/07-949, footnote 41.

²⁴ ICC-01/04-01/06-3017, para. 11.

26. In the RFAs disclosed in the Article 70 Case, the Prosecution requested information which was directly relevant to the credibility of witnesses who testified for the Defence in the Main Case. The Prosecution sought information concerning, *inter alia*, the reasons given by Defence witnesses for [REDACTED];²⁵ the contents of the email accounts of a Defence witness;²⁶ and information which was directly linked by the Prosecution itself to allegations of witness subornation.²⁷ There is no question that the credibility of Defence witnesses is a key issue in dispute between the parties, and that this material fell squarely within the scope of Rule 77.

27. Concrete prejudice arose from the non-disclosure of the RFAs in the Main Case. The content of the RFAs were directly relevant to the Defence's pleadings on abuse of process.²⁸ They directly substantiate the Defence arguments, made in December 2014, that breaches of Defence immunities through the provision of witness names to national authorities would create a risk for Defence witnesses and deter persons from cooperating with the Defence.²⁹ For example, the RFAs demonstrate that the Prosecution informed the DRC authorities about the existence of an Article 70 investigation in May 2013,³⁰ [REDACTED].³¹ As observed by the ICTY Appeals Chamber, privileges and immunities are afforded to Defence investigations precisely because of the risk that exposure of confidential Defence information to national authorities could imperil the safety of witnesses and their families, or deter witnesses from being able to confide in the party interviewing them.³²

²⁵ RFA to France, 29 August 2012, CAR-OTP-0091-0679.

²⁶ RFA to France, 9 October 2013, CAR-OTP-0091-0546.

²⁷ RFA to France, 18 December 2013, CAR-OTP-0091-0566-R01.

²⁸ ICC-01/05-01/08-3217-Conf-Exp.

²⁹ ICC-01/05-01/08-3217-Conf-Exp, para. 28.

³⁰ CAR-OTP-0091-0677-R01.

³¹ ICC-01/05-01/08-T-352-CONF-ENG ET, p.30, line 5 – p.35, line 3.

³² *Prosecutor v. Gotovina et al.*, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, para. 31 and fn. 88.

28. Moreover, the Prosecution responded to the Defence submissions on abuse of process claiming that the legality of its investigative measures were not justiciable by the Trial Chamber because the investigations in question occurred in the context of the Article 70 investigations.³³ The RFAs demonstrate that the information was requested in relation to the Main Case crimes, a fact confirmed by the Prosecution itself during the Article 70 Case.³⁴

29. In addition to being directly relevant to the Defence pleadings on abuse of process, the RFAs are also relevant to the veracity of submissions made by the Prosecution in the present case. On 25 February 2014, the Defence asked the Prosecution to disclose:³⁵

any requests in connection with the Defence case (including, but not limited to, Defence team members, **Defence witnesses**, and any persons who have interacted with the Defence or persons assisting the Defence) made between January 2012 and November 2013.

30. On 3 March 2014, the Prosecution asserted:³⁶

No confidential information concerning the Defence case **or which identified Defence witnesses as such was divulged to any external sources**, including the DRC authorities.

31. The RFAs disclosed in the Article 70 Case demonstrate that this statement was, again, incorrect. The RFAs show, *inter alia*, that the Prosecution identified Defence witnesses to the Cameroonian authorities in December 2013,³⁷ to the DRC

³³ ICC-01/05-01/08-3229-Red2, paras 54, 55, 56.

³⁴ ICC-01/05-01/13-T-34-ENG-RT, p.80, line 24 – p.81, line 5.

³⁵ ICC-01/05-01/08-3016-Conf-AnxB, p.16.

³⁶ ICC-01/05-01/08-3016-Conf-AnxB, p.18.

³⁷ CAR-OTP-0091-0326-R01.

authorities in January 2014,³⁸ and that a complete list of Defence witnesses was given to Western Union in October 2012.³⁹

32. Of great concern, the RFAs also reveal that the Prosecution asked the authorities in both Cameroon and the DRC to **locate** protected witnesses, and provide their address or location to the Prosecution.⁴⁰ Investigative Protocols at the ICC have consistently prohibited parties from making enquiries into the location of protected witnesses.⁴¹ The same prohibition existed at the *ad hoc* tribunals.⁴²

33. The Defence accordingly seeks disclosure of the RFAs in order to make formal submissions on the legality and impact of the Prosecution's investigative strategy on the fairness of the Main Case, and the veracity of the Prosecution's pleadings on the provision of Defence witness information to external sources.

(c) Western Union investigations

34. In September 2012, immediately following the commencement of the Defence presentation of evidence, the Prosecution contacted Western Union's Global Investigation Department, based in Austria, in order to seek the production

³⁸ CAR-OTP-0091-0481-R01.

³⁹ CAR-OTP-0092-0018.

⁴⁰ CAR-OTP-0091-0481-R01; CAR-OTP-0091-0496-R01; CAR-OTP-0091-0333-R01.

⁴¹ ICC-01/05-01/13-1093-Anx, para. 26: "The investigating party shall not make inquiries relating to the current location of protected witnesses"; ICC-01/04-02/06-412-AnxA, para. 24: "The investigating party or participant shall not make inquiries relating to the current location of protected witnesses"; ICC-01/04-01/07-2007-Anx1, p.2: "The investigating party shall not make inquiries relating to the current location of protected witnesses (...) whose location has been protected by the Chamber." ICC-01/09-01/11-449-Anx, para. 24: "A party or participant shall not make inquiries relating to the current location of individuals (...) whose location has been protected by the Chamber, without leave of the Chamber."

⁴² *Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, ICTR-98-41-&73, Decision on Interlocutory Appeals of Decisions on Witness Protection Orders, 6 October 2005, para. 21; *Prosecutor v. Nchamihigo*, ICTR-2001-63-T, Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses, 9 August 2007, para. 8.

of financial records from Western Union's databases relevant to Defence witnesses and Defence team members.⁴³

35. Documents have now been disclosed in the Article 70 Case which detail the interaction between the Prosecution, Western Union, the Austrian Ministry of Justice, the Vienna Prosecutor's Office, the Regional Criminal Tribunal of Vienna, and the Austrian Embassy in The Netherlands.⁴⁴

36. No argument can be made that the Western Union documents are only relevant to the Article 70 Case. Firstly, the documents make explicit reference to the Main Case.⁴⁵ Notably, the Prosecution took possession of financial records of Defence team members and Defence witnesses, the disclosure of which had been authorised on the understanding that they were relevant to allegations of genocide, crimes against humanity and war crimes, as opposed to an investigation into crimes against the administration of justice.⁴⁶

37. Secondly, the Prosecution used information obtained from Western Union as the basis for *ex parte* submissions to the Trial Chamber in relation to credibility of Defence evidence.⁴⁷ The Prosecution informed the Trial Chamber that it had received information from Western Union, in Austria, concerning financial transfers between persons believed to be either Defence witnesses or related to Defence witnesses, and members of the Defence.⁴⁸

⁴³ CAR-OTP-0092-0018.

⁴⁴ CAR-OTP-0092-0018; CAR-OTP-0092-0021; CAR-OTP-0092-0022; CAR-OTP-0092-0027; CAR-OTP-0092-0028; CAR-OTP-0092-0033; CAR-OTP-0092-0035.

⁴⁵ CAR-OTP-0091-0351; CAR-OTP-0091-0360.

⁴⁶ CAR-OTP-0073-0278 (German); CAR-OTP-0082-1948 (French translation); CAR-OTP-0085-0843 (German); CAR-OTP-0087-0006 (French translation).

⁴⁷ T-303-Conf-Red3-ENG-ET.

⁴⁸ ICC-01/05-01/08-2548; T-303-Conf-Red3-ENG-ET.

38. Thirdly, the Prosecution itself has stated in the course of the Article 70 proceedings that information was obtained from Western Union for the purposes of its use in the Main Case:⁴⁹

O STRUYVEN: Maybe just very shortly to correct. These documents date November 2012, and at the time the investigation was taking place in the main case, meaning in relation to the Bemba case in which war crimes and crimes against humanity were alleged. So that is why these documents alleged to these crimes simply because there was no separate Article 70 case.

39. As such, the Prosecution had no legal basis for withholding this material from the Defence in the Main Case. The prejudice which flows from its deliberate non-disclosure is significant. Had the Defence had access to the material from Western Union in a timely manner, it would have been in a position to address these issues with the Defence witnesses at the time of their appearance; the financial records could have been admitted and the witnesses examined on their contents and any influence the alleged transactions had on the truthfulness of their testimony. This would have allowed the Trial Chamber in the present case to make an assessment of the impact of the alleged transactions on the credibility of the witnesses, and contributed to the establishment of the truth in these proceedings. By withholding disclosure, the Prosecution has deprived the Defence of that opportunity, and of the opportunity of either dropping witnesses and/or calling alternative evidence as and if required and/or addressing the issue with them head on during their testimony.

40. More alarmingly, the transmission of information from Western Union to the Prosecution [REDACTED].⁵⁰ [REDACTED].⁵¹ Regardless, the Prosecution used information contained in the transaction records it received from Western Union

⁴⁹ ICC-01/05-01/13-T-34-ENG-RT, p.80, line 24 – p.81, line 5.

⁵⁰ CAR-OTP-0092-0024; CAR-D23-0003-0001; CAR-OTP-0091-0351; CAR-D20-0003-0016.

⁵¹ ICC-01/05-01/13-T-35-ENG-RT, p.102, lines 18-23.

to ask questions to witnesses concerning receipts of money from the Defence, and referred to its existence in filings,⁵² and *ex parte* submissions before the Trial Chamber.⁵³ The Defence was accordingly prejudiced by the non-disclosure of these documents, which were material to its preparation and were used to undermine the credibility of its witnesses, but were also manifestly relevant to its submissions on the legality of the Prosecution's investigation.⁵⁴

41. In addition, the Western Union documents demonstrate that by October 2012, the Prosecution had provided Western Union, an "external source", with a complete list of the Defence witnesses in the Main Case. These documents are therefore material to an assessment of the veracity of the Prosecution's later statement that "[n]o confidential information concerning the Defence case or which identified Defence witnesses as such was divulged to any external sources".⁵⁵

(d) Other RFAs

42. As the Trial Chamber is aware, this is not the first time that the Defence has sought disclosure of RFAs from the Prosecution. In February 2014, the Defence first wrote the Prosecution seeking disclosure of this material.⁵⁶ After the Prosecution refused, the Defence seized the Trial Chamber, noting that RFAs fall within the scope of the Prosecution's disclosure obligations pursuant to Rule 77,

⁵² 16 Defence witnesses testified in the Main Case before March 2013, 10 of these witnesses were asked about money: D07, T-249-CONF-ENG-ET, page 10, line 14 – page 11, line 2; D-57, T-258-CONF-ENG-ET, page 2, line 25 – page 3, line 10; D-64, T-260-CONF-ENG-ET, page 6, lines 14-23; D-55, T-265-CONF-ENG-ET, page 15, lines 7-18; D-48, T-268-CONF--ENG-ET, page 78, line 22 – page 79, line 12; D-49, T-274-CONF-ENG-ET, page 34, lines 2-14; D-16, T-277-CONF-ENG-ET, page 38, lines 7-20, page 39, lines 4-11; D-45, T-297-CONF-ENG-ET, page 18, line 17- page 20, line 5, T-299-CONF-ENG-ET, page 24, lines 11-16; D-59, T-239-CONF-ENG-ET, p.3, lines 15-21; D-19, T-290-CONF-ENG-ET, p.75, line 22 – p.76, line 8; . See also ICC-01/05-01/08-2412-Conf on 15 November 2012, and ICC-01/05-01/08-2548-Conf-Red on 20 Mars 2013 with Annex A.

⁵³ T-303-Conf-Red3-ENG-ET.

⁵⁴ ICC-01/05-01/08-3217-Conf-Exp.

⁵⁵ ICC-01/05-01/08-3016-Conf-AnxB, p.18.

⁵⁶ ICC-01/05-01/08-3020-Conf-AnxA.

and that the material sought was “linked to Defence issues, and falls squarely within the notion of information which is material to the preparation of the Defence.” The defence submitted that it “must be put in a position [in] which it can verify and contest the reliability of the source of any information used to attack the credibility of the Defence case.”⁵⁷

43. The Prosecution opposed disclosure on the basis that the Defence request was “unsubstantiated and fails to establish prima facie that the information sought is material to the preparation of the Defence”.⁵⁸ The Trial Chamber accepted the Prosecution’s submissions, noting in particular that the Defence made only “general pleadings” and concluded that “[o]n the basis of the materials before it, the Chamber finds that information concerning RFAs directed at national authorities is not prima facie material to the preparation of the defence.”⁵⁹

44. The RFAs which have now been disclosed in the Article 70 Case reveal that the Prosecution was providing [REDACTED], and seeking information which was directly relevant to the credibility of Defence witnesses by alleging that these witnesses had given false testimony in the present proceedings. As noted above, the Appeals Chamber has held in *Lubanga* that RFAs which concern a key issue in dispute between the parties are material to the preparation of the Defence.⁶⁰

45. As such, the Defence seizes the Trial Chamber with a request to order the Prosecution to disclose all RFAs which concern Defence witnesses, and any other associated correspondence or documents arising out of contact with these state authorities, such request not being limited to materials already disclosed in the Article 70 Case.

⁵⁷ ICC-01/05-01/08-3020-Conf, paras. 40-44.

⁵⁸ ICC-01/05-01/08-3039, paras. 3, 17.

⁵⁹ ICC-01/05-01/08-3100, para. 29.

⁶⁰ ICC-01/04-01/06-3017, para. 11.

D. CONCLUSION

46. Much of the Material in question should rightly have been disclosed to the Defence years ago. Concrete prejudice has flowed from the Prosecution's continued and consistent avoidance of its statutory obligations. The Prosecution's refusal to disclose the Material on the basis that it has been disclosed in parallel proceedings should be seen for what it is; an attempt to keep these documents away from the present case and avoid any repercussions from its ongoing disclosure violations. Having always previously disclosed material in both cases, the Prosecution's refusal to disclose on this occasion is even more pointed. For the reasons set out above, the Material is manifestly relevant to the preparation of the defence in the Main Case, and should rightly form part of a complete trial record in these proceedings.

E. RELIEF REQUESTED

47. In light of the above, the Defence respectfully requests that the Trial Chamber:

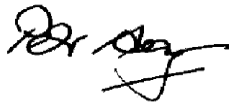
ORDER the Prosecution to disclose immediately the Material identified herein and already disclosed to Mr. Bemba in Case No. ICC-01/05-01/13 to the Defence in the instant case;

ORDER the Prosecution to disclose immediately an un-redacted version of CAR-OTP-0089-1332-R01;

ORDER the Prosecution to disclose immediately any other material generated out of its contact with D-55;

ORDER the Prosecution to disclose immediately all RFAs which concern Defence witnesses, and any other associated correspondence or documents arising out of contact with these state authorities; and

REMAIN seized of the present issue in terms of further Defence requests for relief from prejudice arising out of the Prosecution's breach of its disclosure obligations.



Peter Haynes

Lead Counsel of Mr. Jean-Pierre Bemba

Done at The Hague, the Netherlands

12 January 2016