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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Yekatom Defence Motion for Disclosure of
Prior Statement of Witness P-[REDACTED]**

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 67(2) of the Rome Statute (the ‘Statute’) and Rules 74 and 87 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-[REDACTED]’.

I. Procedural history and submissions

1. On 23 January 2019, the Single Judge of Pre-Trial Chamber II (the ‘PTC II’) directed the Office of the Prosecutor (the ‘Prosecution’), *inter alia*, to disclose evidence in its possession or control under Article 67(2) of the Statute (the ‘Exculpatory Material’) ‘*immediately* after having identified any such evidence, unless some justifiable reasons prevent [it] from doing so’ (the ‘Disclosure Decision’).¹ On 4 April 2019, PTC II ordered the Prosecution to disclose Exculpatory Material ‘by 17 May 2019 at the latest’.²
2. On 15 May 2019, PTC II granted the Prosecution’s request to postpone the confirmation hearing and all related disclosure deadlines.³ Accordingly, it postponed the confirmation hearing’s commencement date to 19 September 2019 and directed the Prosecution to disclose all Exculpatory Material ‘by 19 August 2019 at the latest’.⁴
3. On 20 August 2019, and after the Prosecution had filed its Document Containing the Charges (the ‘DCC’),⁵ the Yekatom Defence (the ‘Defence’) requested PTC II to order the Prosecution to ‘immediately disclose all exculpatory material’, including ‘information tending to [a]ffect the credibility of [P]rosecution evidence such as evidence of criminality of Prosecution

¹ Decision on Disclosure and Related Matters, ICC-01/14-01/18-64-Conf (with one public annex) (public redacted version of the filing notified the same day, ICC-01/14-01/18-64-Red), para. 16.

² Second Decision on Disclosure and Related Matters, ICC-01/14-01/18-163, p. 16.

³ Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’, ICC-01/14-01/18-199 (the ‘Postponement Decision’), para. 39, p. 17.

⁴ Postponement Decision, ICC-01/14-01/18-199, para. 39, p. 18.

⁵ Document Containing the Charges, Annex B1 to the Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence, 19 August 2019, ICC-01/14-01/18-282-Conf-AnxB1 (public redacted version notified on 18 September 2019).

witnesses and information about promises or benefits requested by or provided to Prosecution witnesses’ (the ‘First Motion on Exculpatory Material’).⁶

4. On 21 August 2019, the Prosecution requested PTC II to dismiss the First Motion on Exculpatory Material,⁷ submitting that (i) there was already a standing order on disclosure of exculpatory material contained in the Disclosure Decision; (ii) *inter partes* disclosure had been ongoing in the case without the need to resort to the Chamber’s intervention; and (iii) the Defence did not refer to any specific breach of the Prosecution’s disclosure obligations nor to ‘any matter concerning the application of article 67(2) for the Chamber to “decide”’ (the ‘First Response on Exculpatory Material’).⁸
5. On 23 August 2019, the Defence sent a letter to the Prosecution (the ‘Letter on Exculpatory Material’),⁹ indicating that it seemed that the Prosecution had in its possession ‘considerable evidence’ that witness P-[REDACTED] (the ‘Witness’), upon whom it had relied [REDACTED] in its DCC, had participated in the fabrication of false evidence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the ‘Bemba case’).¹⁰ The Defence indicated that, although this material related to the credibility of a Prosecution witness, it had not been disclosed to the Defence teams.¹¹ It therefore requested the Prosecution (i) to disclose to it this material and indicate why it had not disclosed it earlier, and (ii) to confirm within 48 hours whether it intended to do so (as, otherwise, it would seize PTC II of ‘the apparent violation of Article 67(2)’ of the Statute).¹²
6. On 26 August 2019, the Prosecution responded to the Letter (the ‘Response Letter on Exculpatory Material’),¹³ *inter alia*, (i) recognising that the

⁶ Motion for Disclosure of Exculpatory Material, ICC-01/14-01/18-284, paras 1, 36. *See also* paras 34-35.

⁷ Prosecution’s Response to the Yekatom Defence’s Motion for Disclosure of Exculpatory Material, ICC-01/14-01/18-286, paras 1, 5.

⁸ First Response on Exculpatory Material, ICC-01/14-01/18-286, paras 2-4.

⁹ Yekatom Defence Letter ARY-2019-0058, Annex A to the Motion for Finding of Disclosure Violation and for Remedial Measures, 29 August 2019, ICC-01/14-01/18-301-Conf-AnxA.

¹⁰ Letter on Exculpatory Material, ICC-01/14-01/18-301-Conf-AnxA, paras 2-3.

¹¹ Letter on Exculpatory Material, ICC-01/14-01/18-301-Conf-AnxA, para. 3.

¹² Letter on Exculpatory Material, ICC-01/14-01/18-301-Conf-AnxA, paras 5-7.

¹³ Prosecution Response to ARY-2019-0058, Annex B to the Motion for Finding of Disclosure Violation and for Remedial Measures, 29 August 2019, ICC-01/14-01/18-301-Conf-AnxB.

involvement of the Witness in offences under Article 70 of the Statute, ‘although unrelated to the [present] case [...], is of relevance to his credibility as a prior act involving dishonesty’; but informing the Defence (ii) that the testimony of witnesses in *The Prosecutor v. Bemba et al.* (the ‘*Bemba et al.* case’) ‘which also bear on [the Witness’s] involvement [...] concerning the commission of offences against the administration of justice’ were protected by orders of other chambers of the Court; and (iii) that, in any event, given that the ‘salient information’ on the Witness’s prior conduct was publicly available, it did not consider that ‘the present impracticability of disclosing (information of arguably lesser significance) cause[d] unfair prejudice’ to the Defence.¹⁴

7. On 28 August 2019, PTC II rendered a decision (the ‘First Decision on Exculpatory Material’)¹⁵ whereby it recalled the Prosecution’s obligations under Article 67(2) of the Statute and its Disclosure Decision, in which it directed the Prosecution to immediately disclose Exculpatory Material.¹⁶ Accordingly, PTC II directed the Prosecution to ‘verify whether [it] has in [its] possession any additional evidence, including objective information regarding criminal records for witnesses upon whom [it] intends to rely at the confirmation hearing, which falls within the scope of article 67(2) of the Statute’.¹⁷
8. On 29 August 2019, the Defence filed a motion (the ‘Second Motion on Exculpatory Material’),¹⁸ requesting PTC II to make a finding that the Prosecution had violated its duty to disclose Exculpatory Material concerning the Witness and, ‘as remedial measures, order the immediate disclosure of the material and require the evidence of the witness at the confirmation hearing to

¹⁴ Response Letter on Exculpatory Material, ICC-01/14-01/18-301-Conf-AnxB, p. 1.

¹⁵ Decision on the Yekatom Defence Motion for Disclosure of Exculpatory Material, ICC-01/14-01/18-296.

¹⁶ First Decision on Exculpatory Material, ICC-01/14-01/18-296, paras 12-13. *See also* Disclosure Decision, ICC-01/14-01/18-64-Red, para. 16.

¹⁷ First Decision on Exculpatory Material, ICC-01/14-01/18-296, p. 6.

¹⁸ Motion for Finding of Disclosure Violation and for Remedial Measures, ICC-01/14-01/18-301-Conf (with confidential annexes A and B, ICC-01/14-01/18-301-Conf-AnxA and ICC-01/14-01/18-301-Conf-AnxB) (public redacted version of the main filing notified the same day, ICC-01/14-01/18-301-Red), paras 1, 25.

be heard *viva voce*'.¹⁹ On 30 August 2019, the Ngaïssona Defence joined the Second Motion on Exculpatory Material in its entirety.²⁰

9. On 2 September 2019, the Prosecution requested PTC II to dismiss the Second Motion on Exculpatory Material (the 'Second Response on Exculpatory Material').²¹
10. On 3 September 2019, PTC II found that the Prosecution had 'failed to fully discharge [its] obligation to disclose information relevant to [the] Witness' and, accordingly, directed it to disclose such Exculpatory Material, 'while respecting the protective measures ordered in relation to this witness in other proceedings before the Court' (the 'Second Decision on Exculpatory Material').²² Furthermore, and considering that the information available at that time and the abovementioned disclosure measure would 'sufficiently enable the Defence to exercise their rights in relation to this witness'[s] evidence', PTC II rejected the additional 'remedial measures' requested by the Defence.²³
11. On 10 September 2019, the Prosecution informed PTC II that it was 'not in a position' to disclose the Exculpatory Material concerning the Witness – which includes statements of other witnesses (jointly, the 'Other Witnesses'), correspondence of an anonymous informant and 'the prior statement of [the Witness]' – because this material was subject to protective measures and its disclosure could incriminate or identify these Other Witnesses (the 'Notification on Exculpatory Material').²⁴ Specifically, the Prosecution submitted that, *inter alia*, absent the authorisation of a Chamber, 'disclosure of this information

¹⁹ Second Motion on Exculpatory Material, ICC-01/14-01/18-301-Red, paras 1, 25.

²⁰ Consolidated Ngaïssona Defence Response to 'Motion for Extension of Time to File List of Evidence' (ICC-01/14-01/18-298) and 'Motion for Finding of Disclosure Violation and for Remedial Measures' (ICC-01/14-01/18-301-Conf), ICC-01/14-01/18-303-Conf (public redacted version notified on 18 October 2019, ICC-01/14-01/18-303-Red), paras 11-13.

²¹ Prosecution's Response to the Yekatom Defence's "Motion for Finding a Disclosure Violation and for Remedial Measures", ICC-01/14-01/18-301-Conf, ICC-01/14-01/18-311-Conf, paras 1, 15.

²² Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions, ICC-01/14-01/18-315-Conf (redacted version notified on 3 February 2020, ICC-01/14-01/18-315-Red), para. 78, p. 27. *See also* paras 75-77.

²³ Second Decision on Exculpatory Material, ICC-01/14-01/18-315-Red, para. 79, p. 27.

²⁴ Prosecution's Notification Regarding the Order of Pre-Trial Chamber II in the Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions (ICC-01/14-01/18-315-Conf), ICC-01/14-01/18-330-Conf, paras 6-7, 11-13.

cannot be achieved reasonably or fairly in a manner which respects the existing protective orders' issued by another chamber of the Court.²⁵

12. On 17 September 2019, the Defence responded to the Notification on Exculpatory Material, requesting PTC II to order the Prosecution to immediately disclose the material or, alternatively, to exclude the Witness's evidence from the confirmation hearing.²⁶
13. On 11 December 2019, PTC II rendered its decision on the confirmation of charges (the 'Confirmation Decision'),²⁷ in which it reiterated that the Prosecution had 'failed to fully discharge its obligation "to disclose information relevant to [the] Witness"'.²⁸ Further, while PTC II decided not to exclude such material from the confirmation of charges, considering that this would be an 'excessive and disproportionate measure', it refrained from entering findings based entirely on the Witness.²⁹
14. On 13 December 2019, the Defence sent an *inter partes* request to the Prosecution whereby, noting that the Witness had referred to 'a previous interview held in [REDACTED] with the [...] Prosecution', it requested disclosure of 'all interview products from the said meeting' (the '*Inter Partes* Request on Exculpatory Material').³⁰
15. On 17 December 2019, the Defence requested PTC II to order, pursuant to Regulation 42(3) of the Regulations of the Court (the 'Regulations'), the variation of the protective measures currently applicable in the *Bemba et al.* case to allow the Prosecution to disclose the redacted versions of the

²⁵ Notification on Exculpatory Material, ICC-01/14-01/18-330-Conf, para. 8.

²⁶ Response to Prosecution Notification Refusing to Disclose Exculpatory Material, ICC-01/14-01/18-349-Conf (public redacted version notified on 27 March 2020, ICC-01/14-01/18-349-Red), paras 26-27.

²⁷ Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona', ICC-01/14-01/18-403-Conf-Corr (corrected version and corrected version of the public redacted version, ICC-01/14-01/18-403-Red-Corr, notified on 14 May 2020).

²⁸ Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 33.

²⁹ Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 34.

³⁰ See Motion for Disclosure of Prior Statement of Witness P-[REDACTED], 4 May 2020, ICC-01/14-01/18-506-Conf (with confidential Annex A) (public redacted version of the main filing notified the same day, ICC-01/14-01/18-506-Red), para. 10, n. 8.

Exculpatory Material concerning the Witness (the ‘Variation Application’),³¹ which the Defence divided up into three distinct categories, namely (i) redacted versions of all prior statements, transcripts, recordings, investigator’s notes and emails of the Witness concerning the fabrication of evidence in the *Bemba et al.*, case, (ii) redacted versions of the information from an informant and (iii) redacted versions of the transcripts of the testimony and prior statements of the Other Witnesses in the *Bemba et al.* case.³² In relation to the Other Witnesses, the Defence proposed to redact their names and replace them with pseudonyms in order to avoid revealing their identities.³³

16. On 24 December 2019, the Prosecution responded to the Variation Application (the ‘Variation Response’),³⁴ submitting that PTC II ‘should allow the Parties and Participants access to material in *The Prosecutor v. Bemba et al.* bearing on [the] Witness[’s] credibility’.³⁵ The Prosecution noted that this material falls into three categories, namely (i) the transcripts of the Other Witnesses and witness [REDACTED], (ii) the transcripts of prior statements of the Other Witnesses and (iii) the unredacted *Bemba et al.* Trial Judgment.³⁶ The Prosecution further submitted that (i) in order to grant access to the transcript of testimony of the Other Witnesses and witness [REDACTED], ‘an explicit modification to the rule 74 assurances given in respect of th[ose] four witnesses would be necessary’;³⁷ (ii) this could be done by ‘simply expanding the number of persons to whom the obligations concerning the protections apply’;³⁸ and (iii) while it considered Regulation 42(3) of the Regulations to be inapplicable in

³¹ Application to Vary Protective Measures in *Bemba et al* Case, ICC-01/14-01/18-407-Conf (public redacted version notified on 23 January 2020, ICC-01/14-01/18-407-Red), paras 1, 24.

³² See Variation Application, ICC-01/14-01/18-407-Red, paras 20-23.

³³ Variation Application, ICC-01/14-01/18-407-Red, paras 21-24.

³⁴ Prosecution’s response to the Yekatom Defence’s Application to Vary Protective Measures in *Bemba et al* Case (ICC-01/14-01/18-407-Conf), ICC-01/14-01/18-415-Conf (with confidential Annex A, ICC-01/14-01/18-415-Conf-AnxA) (public redacted version of the main filing notified the same day, ICC-01/14-01/18-415-Red).

³⁵ Variation Response, ICC-01/14-01/18-415-Red, para. 1.

³⁶ Variation Response, ICC-01/14-01/18-415-Red, para. 6; Annex A to the Variation Response, ICC-01/14-01/18-415-Conf-AnxA.

³⁷ Variation Response, ICC-01/14-01/18-415-Red, paras 2, 7.

³⁸ Variation Response, ICC-01/14-01/18-415-Red, para. 9.

this situation, it did not oppose the Variation Application on the basis that it was founded in said provision.³⁹

17. On 22 January 2020, PCT II found that it had ‘fulfilled its first and foremost function in respect of this case’ with the conclusion of the confirmation proceedings (the ‘Variation Decision’).⁴⁰ Thus, in considering, *inter alia*, that a matter which essentially revolved around the relevance of the evidence at stake would be ‘best left to the consideration of the Trial Chamber’,⁴¹ PTC II dismissed the Variation Application *in limine*.⁴²
18. On 12 March 2020, the Prosecution responded to the *Inter Partes* Request on Exculpatory Material by indicating that ‘all responsive documents registered under the relevant interview’⁴³ have been disclosed’ (the ‘*Inter Partes* Response on Exculpatory Material’).⁴⁴
19. On 4 May 2020, the Defence filed a motion before this Chamber, requesting (i) that it order the Prosecution to immediately disclose ‘the statement given by [the] Witness in [REDACTED][.] in connection with the *Bemba et al*[.] case’ relating to the fabrication of evidence in the *Bemba* case (the ‘Witness Statement’)⁴⁵ or, alternatively (should the Prosecution deny its exculpatory nature), that the Single Judge ‘review the statement *in camera* and decide if it should be disclosed [...]’;⁴⁶ and (ii) that it make an express finding that the Prosecution’s failure to do so was in violation of Article 67(2) of the Statute

³⁹ Variation Response, ICC-01/14-01/18-415-Red, para. 10. *See also* paras 2, 8.

⁴⁰ Decision on the Yekatom Defence Application to vary protective measures (ICC-01/14-01/18-407-Conf), ICC-01/14-01/18-422-Conf (public redacted version notified the same day, ICC-01/14-01/18-422-Red), para. 6.

⁴¹ Variation Decision, ICC-01/14-01/18-422-Red, para. 6.

⁴² Variation Decision, ICC-01/14-01/18-422-Red, p. 6.

⁴³ The Chamber notes the parties’ disagreement as to whether the Prosecution was referring to the [REDACTED] interview in this correspondence.

⁴⁴ *See* Motion for Disclosure of Prior Statement of Witness P-[REDACTED], 4 May 2020, ICC-01/14-01/18-506-Conf (with confidential Annex A) (public redacted version of the main filing notified the same day, ICC-01/14-01/18-506-Red), para. 15, n. 14.

⁴⁵ Motion for Disclosure of Prior Statement of Witness P-[REDACTED], ICC-01/14-01/18-506-Conf (with confidential Annex A, ICC-01/14-01/18-506-Conf-AnxA) (public redacted version of the main filing notified the same day, ICC-01/14-01/18-506-Red), paras 1, 27.

⁴⁶ Motion for Disclosure, ICC-01/14-01/18-506-Red, para. 24.

(the ‘Motion for Disclosure’).⁴⁷ The Defence submits that it has confirmed that the Witness Statement is in the Prosecution’s possession and control and has been ‘for many years’,⁴⁸ and that it is of exculpatory nature under Article 67(2) of the Statute, regardless of whether the Witness confirmed or denied his involvement in the fabrication of evidence in the *Bemba* case.⁴⁹ The Defence also reiterates its proposal to redact the identities of the Other Witnesses and replace them with pseudonyms to allow for the disclosure of the Witness Statement ‘without the necessity of modifying any of the witness protective measures in the *Bemba et al*[.] case, or infringing upon any Rule 74 assurances that were given to witnesses in that case’.⁵⁰

20. On 11 May 2020, the Ngaissona Defence joined the Motion for Disclosure.⁵¹
21. On 13 May 2020, the Prosecution responded to the Motion for Disclosure (the ‘Response’),⁵² requesting PTC II to reject it on the grounds that (i) it is ‘premature and ignores the Pre-Trial Chamber’s prior decision on the matter’ or, alternatively, that (ii) it is ‘unfounded and attempts to circumnavigate the appropriate procedure to obtain [the Witness’s] [S]tatement’.⁵³ The Prosecution therefore requests the Chamber to direct the Defence to file an application to vary the relevant protective measures.⁵⁴
22. First, the Prosecution submits that the Witness Statement does not concern the investigation of this case, but that ‘its primary relevance derives from its possible effect on the credibility of [the Witness] as a prospective *trial*

⁴⁷ Motion for Disclosure, ICC-01/14-01/18-506-Red, paras 1, 27. *See also* para. 25, where the Defence submits that ‘[s]uch a finding will serve as a deterrent to future violations in this case’.

⁴⁸ Motion for Disclosure, ICC-01/14-01/18-506-Red, para. 18, where the Defence submits that (i) the witness and the Prosecution both refer to ‘a previous meeting and interview held in [REDACTED]’, (ii) the Prosecution has confirmed being in possession of the Witness Statement, and (iii) the witness confirmed to a member of the Defence that he had been interviewed in [REDACTED] by the Prosecution and that the interview had been recorded. *See also* para. 22.

⁴⁹ Motion for Disclosure, ICC-01/14-01/18-506-Red, paras 19-21.

⁵⁰ Motion for Disclosure, ICC-01/14-01/18-506-Red, para. 23.

⁵¹ *See* email from the Ngaissona Defence to the Chamber, 11 May 2020, at 16:01.

⁵² Prosecution’s Response to Motion for Disclosure of Prior Statement of Witness P-[REDACTED] (ICC-01/14-01/18-506-Conf), ICC-01/14-01/18-513-Conf (public redacted version notified on 18 May 2020, ICC-01/14-01/18-513-Red).

⁵³ Response, ICC-01/14-01/18-513-Red, paras 1, 25.

⁵⁴ Response, ICC-01/14-01/18-513-Red, paras 1, 25.

witness’.⁵⁵ It further submits, however, that it has not completed its selection of trial witnesses and that PTC II had dismissed the Defence’s Variation Application precisely because of this threshold question.⁵⁶

23. Second, the Prosecution submits that the Motion for Disclosure is unfounded because the Defence, *inter alia*, (i) is required to apply for a variation of protective measures to the Chamber;⁵⁷ (ii) has mischaracterized the Prosecution’s position (which has been consistent in maintaining the need for judicial authorisation to remove the disclosure impediments, while at the same time identifying the materials to which the parties and participants should be granted access);⁵⁸ and (iii) misrepresents its *Inter Partes* Response on Exculpatory Material.⁵⁹ On this point, the Prosecution submits that this response addressed the Defence’s specific demand for material concerning an interview with the Witness conducted in [REDACTED] on [REDACTED], not the Witness Statement.⁶⁰ Furthermore, the Prosecution submits that the latter could not be considered a ‘prior witness statement’ under Rule 76(1) of the Rules because it concerns the Witness’s knowledge of *another* case.⁶¹
24. Finally, the Prosecution submits that the Defence’s request for an express finding of a disclosure violation is baseless, considering ‘the procedural history in this matter and the Pre-Trial Chamber’s dismissal *in limine* of the Varia[tion] Application’,⁶² as well as the absence of any allegations of prejudice by the Defence.⁶³

II. Analysis

25. At the outset, the Single Judge recalls that, pursuant to Article 67(2) of the Statute, the Prosecution is obliged to disclose to the defence ‘as soon as

⁵⁵ Response, ICC-01/14-01/18-513-Red, para. 5.

⁵⁶ Response, ICC-01/14-01/18-513-Red, paras 6-7; *referring to* Variation Decision, ICC-01/14-01/18-422-Red, paras 6-7.

⁵⁷ Response, ICC-01/14-01/18-513-Red, paras 9-11.

⁵⁸ Response, ICC-01/14-01/18-513-Red, paras 12-13.

⁵⁹ Response, ICC-01/14-01/18-513-Red, paras 17-21.

⁶⁰ Response, ICC-01/14-01/18-513-Red, paras 17-19.

⁶¹ Response, ICC-01/14-01/18-513-Red, para. 20.

⁶² Response, ICC-01/14-01/18-513-Red, para. 22.

⁶³ Response, ICC-01/14-01/18-513-Red, para. 24.

practicable, [...] evidence in the Prosecut[ion]’s possession or control which [it] 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’. The accused’s entitlement to disclosure of exculpatory material is part of their fundamental right to a fair trial.⁶⁴ In case of doubt as to the application of Article 67(2) of the Statute, it is for a chamber to decide.⁶⁵

26. First, the Single Judge notes that the parties seem to disagree over which specific witness statement they addressed during their *inter partes* consultations.⁶⁶ However, considering that the Defence clearly refers to the Witness Statement in its Motion for Disclosure, and that the Prosecution has already disclosed the transcripts of the interview it conducted with the Witness on [REDACTED] in [REDACTED],⁶⁷ the Single Judge will limit its analysis to the Witness Statement and whether it qualifies as Exculpatory Material under Article 67(2) of the Statute.

27. To that effect, the Single Judge notes that the Prosecution previously recognised that ‘[the Witness]’s involvement in offences against the administration of justice, although unrelated to the case against N[gaïssona] and Y[ekatom], is of relevance to [the Witness]’s credibility as a prior act involving dishonesty’.⁶⁸ In addition, in its Response, the Prosecution denies having withheld the Witness Statement ‘without a colourable basis’ and acknowledges that this is clear from, *inter alia*, its ‘concurrence that [the Witness]’s involvement in the offences

⁶⁴ See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, 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, ICC-01/04-01/06-1401, para. 77, where Trial Chamber I held that its finding was established ‘not only by the provisions of Article 67(2) of the Statute, but also by a review of the relevant international jurisprudence and particularly that of the European Court of Human Rights and the ICTY’.

⁶⁵ See the second sentence of Article 67(2) of the Statute, which stipulates that ‘[i]n case of doubt as to the application of this paragraph, the Court shall decide’.

⁶⁶ See paragraph 18 above. See also Response, ICC-01/14-01/18-513-Red, para. 18, where the Prosecution submits that the Defence misrepresented the *Inter Partes* Response on Exculpatory Material, which did not address the Witness Statement, but the ‘material concerning the Prosecution’s [REDACTED] interview of [the Witness]’ taken in [REDACTED].

⁶⁷ See Response, ICC-01/14-01/18-513-Red, para. 18, n. 27, where the Prosecution indicates that it [REDACTED].

⁶⁸ Response Letter on Exculpatory Material, ICC-01/14-01/18-301-Conf-AnxB, p. 1 (emphasis added).

charged in the *Bemba et al*[.] case fall within article 67(2), as conduct involving dishonesty’.⁶⁹

28. Second, the Single Judge observes that while the Prosecution clearly recognised in its Variation Response that the parties and participants should be allowed ‘access to material in *The Prosecutor v. Bemba et al*[.] bearing on [the] Witness[’s] credibility’,⁷⁰ it now argues in its Response that the disclosure of the Witness Statement is ‘premature’ on grounds that it has yet to make a decision on whether to actually call the Witness to testify at trial.⁷¹
29. The Single Judge is of the view that ‘prosecution evidence’ under Article 67(2) of the Statute must be interpreted broader than the scope of witnesses described in Rules 76(1) and 77 of the Rules, which specifically refer to witnesses whom the Prosecution ‘intends to call to testify’ at trial and witnesses’ evidence that the Prosecution intends to use ‘as evidence at trial’, respectively. The Single Judge does not consider it necessary to exhaustively define the scope of ‘prosecution evidence’ under Article 67(2) of the Statute. However, in this specific instance, and noting that the Prosecution has relied on this witness in its DCC, the Single Judge considers that the Witness Statement falls within the scope of this provision. Moreover, the Single Judge considers that the Witness’s involvement in a case dealing with offences against the administration of justice may affect this witness’s credibility in the present case and is thus relevant under Article 67(2) of the Statute.

⁶⁹ Response, ICC-01/14-01/18-513-Conf, para. 16. *See also* other submissions made by the Prosecution in its filings preceding the Response, such as Second Response on Exculpatory Material, ICC-01/14-01/18-311-Conf, para. 3, where it referred to ‘the material *bearing on the credibility of [the] Witness*’ arising out of the *Bemba et al.* case (emphasis added); paras 6, 10, where it asserted that because the most pertinent information was ‘public, easily searchable, and accessible’, the Defence was ‘fully able to challenge the Witness’s credibility at the confirmation hearing’; Notification on Exculpatory Material, ICC-01/14-01/18-330-Conf, para. 6, where the Prosecution informed PTC II that ‘as concerns *information relating to [the] Witness under article 67(2)*, [it] ha[d] reviewed the information within its possession going to the culpable involvement of [the Witness] in the offences against the administration of justice charged in the *Bemba et al*[.] case’, but was nonetheless ‘not in a position to disclose this material’ (emphasis added); Variation Response, ICC-01/14-01/18-415-Red, para. 5, where the Prosecution submitted that it had ‘conducted a review of the *Bemba et al*[.] case record, as well as its own records, to identify *material which may affect the credibility of [the] Witness*, in that it tends to show the witness’s involvement in the commission of offences under article 70’ (emphasis added).

⁷⁰ Variation Response, ICC-01/14-01/18-415-Red, para. 1.

⁷¹ Response, ICC-01/14-01/18-513-Red, paras 1, 5-7, 25.

30. Consequently, the Single Judge considers that the Witness Statement and any other Exculpatory Material relating to the Witness's credibility qualifies as 'prosecution evidence' under Article 67(2) of the Statute and must be disclosed.
31. Further, the Single Judge finds that the Prosecution has failed to fully discharge its obligation to disclose information relevant to the Witness.⁷²
32. Turning to the question on how to materially proceed with the disclosure of the Witness Statement, the Single Judge, mindful of his obligations under Article 68(1) of the Statute and for reasons of procedural economy, considers that the appropriate remedy in this case is the disclosure of redacted versions of the Witness Statement and, if any, of other Exculpatory Material relating to the Witness's credibility.
33. Accordingly, at the earliest opportunity and, at the latest, by 6 July 2020, the Prosecution shall provide to the Defence the Witness Statement and, if any, other Exculpatory Material relating to the Witness's credibility, applying the necessary redactions to the identifying information of protected witnesses.
34. Finally, as regards the question of whether Regulation 42(3) of the Regulations applies to the matter at hand,⁷³ the Single Judge finds that, to the extent that such matter relates to the effectiveness of existing protective measures rather than to their variation, the said provision is not applicable. In the Single Judge's view, this approach is consistent with the Court's case law.⁷⁴

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Motion for Disclosure; and

⁷² See also Second Decision on Exculpatory Material, ICC-01/14-01/18-315-Red, para. 78; Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 33.

⁷³ See Variation Decision, ICC-01/14-01/18-422-Red, para. 8, where PTC II held that, having dismissed the Variation Application *in limine*, there was no need for it to 'resolve the issue as to whether the power to amend the existing protective measures would be based on regulation 42 of the Regulations or elsewhere'.

⁷⁴ See e.g. Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Order on Defence access to confidential material in the Lubanga case, 1 September 2015, ICC-01/04-02/06-806, paras 6-7.

INSTRUCTS the Prosecution to disclose to the Defence redacted versions of the Witness Statement and, if any, of other Exculpatory Material relating to the Witness's credibility, by the deadline set in paragraph 33 above.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Single Judge

Dated 15 June 2020

At The Hague, The Netherlands