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No.: ICC-01/05-01/08

Date: 2 July 2014

**TRIAL CHAMBER III**

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

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

**Public**

**Decision on defence requests for disclosure**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr Jean-Jacques Badibanga

**Counsel for the Defence**

Mr Peter Haynes  
Ms Kate Gibson  
Ms Melinda Taylor

**Legal Representatives of the Victims**

Ms Marie-Edith Douzima Lawson

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

Mr Xavier-Jean Keita

**States Representatives**

**Amicus Curiae**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”), issues the following Decision on defence requests for disclosure (“Decision”).

## I. Background

1. On 26 April 2013, the Chamber issued its “Decision on the prosecution’s request relating to Article 70 investigation” (“Decision 2606”),<sup>1</sup> in which it decided that it had no competence to address a request from the Office of the Prosecutor (“prosecution”) for judicial assistance in an investigation related to alleged offences under Article 70 of the Rome Statute (“Statute”) (the “Article 70 investigation”).<sup>2</sup> Subsequently, the prosecution initiated proceedings related to the alleged offences in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (“case ICC-01/05-01/13”) before Pre-Trial Chamber II.<sup>3</sup>
2. On 19 March 2014, the defence for Jean-Pierre Bemba Gombo in the *Bemba* case (“defence”) filed its “Defence Request for Disclosure” (“Defence Request”),<sup>4</sup> requesting that the Chamber (i) order the prosecution to disclose certain information previously requested by the defence in *inter*

<sup>1</sup> Decision on the prosecution’s request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Red-Exp, paragraph 22. This decision was reclassified as confidential, pursuant to Trial Chamber III’s order ICC-01/05-01/08-2920-Conf, on 9 December 2013. A public redacted version of this decision was filed on 2 May 2014, Public Redacted Version of “Decision on the prosecution’s request relating to Article 70 investigation”, ICC-01/05-01/08-2606-Red.

<sup>2</sup> ICC-01/05-01/08-2606-Red, paragraph 22.

<sup>3</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13.

<sup>4</sup> Defence Request for Disclosure, 19 March 2014, ICC-01/05-01/08-3020-Conf, with confidential Annexes A, B, C, D, E, F, G, and H. The defence filed public versions of these filings on the same day: ICC-01/05-01/08-3020-Red, with public redacted Annexes A, B, C, D, G, and H, and public Annexes E and F.

*partes* correspondence<sup>5</sup> (“Requested Information”) (“First Request”); and (ii) “[remain seized] of the need to sanction the Prosecution by either excluding any incriminating material or charges to which the Requested Information relates, or drawing inferences either against the Prosecution or in favour of the Defence, as appropriate” (“Second Request”).<sup>6</sup>

3. According to the defence, the Requested Information falls into three categories: (i) “[i]nformation which is germane to the protection of Defence witnesses”; (ii) “[i]nformation concerning requests for assistance [“(RFAs”)”] directed to national authorities”; and (iii) “[i]nformation concerning the circumstances under which Defence witnesses were interviewed, which might be relevant to the credibility and reliability of any statements taken through such interviews”.<sup>7</sup>
4. On 7 April 2014, the defence filed its “Defence Further Request for Disclosure” (“Defence Further Request”),<sup>8</sup> requesting that the Chamber order (i) “the disclosure of any and all exculpatory materials ‘related to Narcisse Arido’” (“Third Request”); and (ii) “that the Prosecution review all materials in its possession gathered during the Article 70 investigation

<sup>5</sup> See ICC-01/05-01/08-3020-Red, paragraph 27; ICC-01/05-01/08-3020-AnxA-Red, ICC-01/05-01/08-3020-AnxB-Red, ICC-01/05-01/08-3020-AnxD-Red, ICC-01/05-01/08-3020-AnxE-Conf, ICC-01/05-01/08-3020-AnxG-Conf. The Chamber notes its reference to the document numbers of materials currently classified as confidential. The Chamber is of the view that its limited reference to these documents in this instance does not require confidential treatment at this time.

<sup>6</sup> ICC-01/05-01/08-3020-Red, paragraph 6.

<sup>7</sup> ICC-01/05-01/08-3020-Red, paragraph 19 and 28.

<sup>8</sup> Defence Further Request for Disclosure, 7 April 2014, ICC-01/05-01/08-3033-Conf, with Annex A and confidential Annex B. The defence filed public versions of these filings on the same day: ICC-01/05-01/08-3033-Red, with Annex A and public redacted Annex B.

and ensure compliance with its disclosure obligations in the [Bemba] case” (“Fourth Request”).<sup>9</sup>

5. On 10 April 2014, the prosecution filed its “Consolidated Prosecution Response in Opposition to ‘Defence request for Disclosure’ and ‘Defence Further Request for Disclosure’” (“Prosecution Response”).<sup>10</sup> The prosecution requests that the Chamber deny the Defence Request and Defence Further Request.<sup>11</sup>
6. On 25 April 2014, with the leave of the Chamber,<sup>12</sup> the defence filed its “Defence Reply to Prosecution’s response on Defence Request for disclosure” (“Defence Reply”),<sup>13</sup> in which it made submissions on (i) the scope of the prosecution’s duty to disclose potentially exculpatory evidence under Article 67(2) of the Statute and information material to the preparation of the defence under Rule 77 of the Rules of Procedure and Evidence (“Rules”); and (ii) the propriety of the prosecution’s submissions concerning defence Counsel.<sup>14</sup>
7. On 22 May 2014, the Chamber issued its “Decision on the ‘Defence Motion on Prosecution contact with its witnesses’” (“Decision 3070”),<sup>15</sup> instructing the prosecution to, *inter alia*, “permit the defence to inspect all relevant

<sup>9</sup> ICC-01/05-01/08-3033-Red, paragraph 16.

<sup>10</sup> Consolidated Prosecution Response in Opposition to “Defence Request for Disclosure” and “Defence Further Request for Disclosure”, 10 April 2014, ICC-01/05-01/08-3039-Conf. Per the Chamber’s instructions, the filing was reclassified as public on 2 May 2014, ICC-01/05-01/08-3039.

<sup>11</sup> ICC-01/05-01/08-3039, paragraph 20.

<sup>12</sup> Decision on “Defence Request for Leave to Reply to the ‘Consolidated Response to the Defence Requests’”, 17 April 2014, ICC-01/05-01/08-3049.

<sup>13</sup> Defence Reply to Prosecution’s response on Defence Request for disclosure, 25 April 2014, ICC-01/05-01/08-3055-Conf. A public redacted version of this filing was filed on the same day, ICC-01/05-01/08-3055-Red.

<sup>14</sup> ICC-01/05-01/08-3055-Red, paragraph 1.

<sup>15</sup> Decision on “Defence Motion on Prosecution contact with its witnesses”, 22 May 2014, ICC-01/05-01/08-3070-Conf. See paragraph 9 below.

material falling within the scope of Article 67(2) of the Statute and Rule 77 of the Rules, subject to restrictions on disclosure provided for in the Statute and Rules 81 and 82 of the Rules.”<sup>16</sup>

## II. Submissions and analysis

8. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute, the Chamber has considered Articles 54, 57, 64(2), (6)(c) and (7), and 67(1) and (2) of the Statute, Rules 77, 81 and 82 of the Rules, and Regulation 20 of the Regulations.
  
9. As a preliminary issue, the Chamber notes that Decision 3070 is currently classified as confidential because it refers to a paragraph of an *ex parte* filing: Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence (“Document 2548”).<sup>17</sup> A public redacted version of Document 2548 contains a redaction to paragraph 38(e).<sup>18</sup> As the information contained in paragraph 38(e) is already publicly available, the Chamber is of the view that the continued redaction of such information is no longer necessary. In light of the above, as well as the principle of publicity of the proceedings enshrined in Article 67(1) of the Statute and Regulation 20 of the Regulations, the Chamber is of the view that Decision 3070 does not require continued confidential treatment. In so far as Decision 3070 refers to other confidential filings, the Chamber

<sup>16</sup> ICC-01/05-01/08-3070, paragraph 30.

<sup>17</sup> Notice to the Trial Chamber of Article 70 Investigation and Request for Judicial Assistance to Obtain Evidence, 20 March 2013, ICC-01/05-01/08-2548-Conf-Exp (“Document 2548”). A confidential redacted version of Document 2548 was filed on 31 January 2014: ICC-01/05-01/08-2548-Conf-Red and a public redacted version of Document 2548 was filed on 19 May 2014: ICC-01/05-01/08-2548-Red3.

<sup>18</sup> ICC-01/05-01/08-2548-Red3, paragraph 38(e).

finds that the limited reference to these documents does not require confidential treatment at this time.

10. Turning to the defence's requests, the Chamber recalls its consistent approach to the prosecution's disclosure obligations under Article 64(7), 67(1) and (2) of the Statute and Rule 77 of the Rules, as expressed in Decision 3070.<sup>19</sup> The Chamber reiterates that "responsibility for ensuring that the prosecution satisfies its disclosure obligations rests with the prosecution itself... The Chamber's role is limited to resolving disputes when there are grounds for suggesting that the prosecution has failed to discharge its ongoing disclosure obligations."<sup>20</sup>

11. The Chamber notes that, in line with its previous decisions<sup>21</sup> and the Court's jurisprudence,<sup>22</sup> the prosecution's disclosure obligation under the materiality prong of Rule 77 of the Rules is broad but not unlimited. Further, as the Chamber held in Decision 3070:<sup>23</sup>

An item will be considered material to the preparation of the defence if it would undermine the prosecution case or support a line of argument of the

<sup>19</sup> ICC-01/05-01/08-3070-Conf.

<sup>20</sup> ICC-01/05-01/08-3070-Conf, paragraph 20. *See, inter alia*, Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-Red, paragraphs 30 and 37; Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paragraphs 215 and 216; and Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 12 July 2011, ICC-01/0501/08-1594-Red.

<sup>21</sup> *See* ICC-01/05-01/08-750-Conf; ICC-01/05-01/08-802; ICC-01/05-01/08-1594-Red; and ICC-01/05-01/08-3070, paragraph 23.

<sup>22</sup> 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, paragraph 38; 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, paragraph 77; Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, paragraph 16 and Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219, 30 August 2010, ICC-01/04-01/07-2309-Red-tENG

<sup>23</sup> ICC-01/05-01/08-3070, paragraph 23 (emphasis added) (internal quotations omitted).

defence or significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case. The Chamber considers that items do not necessarily need to be directly linked to exonerating or incriminating evidence, nor have been admitted as evidence in the case, in order to be considered material to the preparation of the defence.

### *First Request*

12. Regarding the First Request, the defence submits that effective protection of any persons who provides evidence or information is relevant to Mr Bemba's defence.<sup>24</sup> The defence notes the prosecution's submission in case ICC-01/05-01/13 that an anonymous informant "provided reliable information on the identity and the travel itineraries of one Defence witness".<sup>25</sup> The defence submits that if the anonymous informant "provided information on the identity of a Defence witness [...] the Prosecution should have investigated further as to how [the anonymous informant] was aware of both the identity and movements of a Defence witness, and immediately informed both the VWU and the Trial Chamber".<sup>26</sup> The defence also notes that in an *inter partes* communication, the prosecution informed the defence that the anonymous informant "did not give us any witness names" and that "[the prosecution] never provided the informant with information on the identities of Defence witnesses".<sup>27</sup>

13. Further, the defence alleges a discrepancy between information the prosecution provided to the defence—i.e., that the anonymous informant

<sup>24</sup> ICC-01/05-01/08-3020-Red, paragraph 28.

<sup>25</sup> ICC-01/05-01/08-3020-Red, paragraph 30 (emphasis in original). *See also* ICC-01/05-44-Red, paragraph 10 (according to the prosecution, the information received from the informant formed the basis for the initiation of the Article 70 investigation).

<sup>26</sup> ICC-01/05-01/08-3020-Red, paragraph 33 and 38.

<sup>27</sup> ICC-01/05-01/08-3020-Red, paragraph 30 to 31 (emphasis in original)(internal citation omitted)



did not give the prosecution any witness names—and to Pre-Trial Chamber II—i.e., that the anonymous informant was aware of the identity of a defence witness.<sup>28</sup> The defence asserts an interest in ensuring that the prosecution has “not misled the Court in order to justify the imposition of significantly prejudicial measures against the Defence”.<sup>29</sup> The defence argues that the prosecution “should be compelled to clearly and exhaustively respond to the Defence questions on this matter”.<sup>30</sup>

14. In regard to the RFAs directed to national authorities, the defence avers that the Court’s jurisprudence confirms that RFAs fall within the scope of the prosecution’s disclosure obligations pursuant to Rule 77.<sup>31</sup> The defence notes that it requested “information concerning [RFAs] directed to the [Democratic Republic of Congo (“DRC”)], which pertain[s] to the Defence case”.<sup>32</sup> The defence argues that its request “is linked to Defence issues, and falls squarely within the notion of information which is material to the preparation of the Defence”.<sup>33</sup> The defence submits 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” and that the “existence and scope of any assistance from the DRC authorities is thus directly relevant to the preparation of the Defence”.<sup>34</sup>

15. The defence also requests information regarding the circumstances of witness interviews in case ICC-01/05-01/13 and submits that the

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<sup>28</sup> ICC-01/05-01/08-3020-Red, paragraphs 30 to 39.

<sup>29</sup> ICC-01/05-01/08-3020-Red, paragraphs 29.

<sup>30</sup> ICC-01/05-01/08-3020-Red, paragraph 39.

<sup>31</sup> ICC-01/05-01/08-3020-Red, paragraph 40.

<sup>32</sup> ICC-01/05-01/08-3020-Red, paragraph 43 (emphasis omitted).

<sup>33</sup> ICC-01/05-01/08-3020-Red, paragraph 43.

<sup>34</sup> ICC-01/05-01/08-3020-Red, paragraph 44.

prosecution's application to admit evidence obtained in the Article 70 investigation "appears to be premised on the hypothesis that the Defence witnesses were amenable to changing their testimony through inducements".<sup>35</sup> The defence submits that if this hypothesis is correct, then "it equally follows that they may have been induced to provide false testimony to the Prosecution through promises of witness relocation and/or assistance, or through the application of potentially coercive measures".<sup>36</sup> The defence argues that it is entitled to explore this and other related issues.<sup>37</sup>

16. The defence submits that the prosecution has "never disputed" that the Requested Information falls within the scope of Article 67(2) of the Statute or Rule 77 of the Rules.<sup>38</sup> According to the defence, the prosecution instead seeks to unilaterally exempt itself from its disclosure obligation.<sup>39</sup> The defence underlines the relevance of the Requested Information, in particular its relevance to: (i) the defence's ability "to prepare its response to the Prosecution's Application to admit the Article 70 evidence";<sup>40</sup> (ii) "arguments concerning the reliability, weight or context of the Article 70 evidence";<sup>41</sup> (iii) "any future litigation concerning the extent to which the Article 70 investigation has prejudiced Mr. Bemba's rights in the [*Bemba*

<sup>35</sup> ICC-01/05-01/08-3020-Red, paragraph 45.

<sup>36</sup> ICC-01/05-01/08-3020-Red, paragraph 46.

<sup>37</sup> ICC-01/05-01/08-3020-Red, paragraphs 46 to 48.

<sup>38</sup> ICC-01/05-01/08-3020-Red, paragraph 51.

<sup>39</sup> ICC-01/05-01/08-3020-Red, paragraph 51.

<sup>40</sup> ICC-01/05-01/08-3020-Red, paragraph 55. On 29 November 2013, the prosecution filed its "Prosecution's Application to Submit Additional Evidence", ICC-01/05-01/08-2910. The defence filed a response: Response to the Prosecution's Application to Submit Additional Evidence, 15 January 2014, ICC-01/05-01/08-2937-Red. The prosecution submitted a reply: Prosecution's Reply to the Defence "Response to the Prosecution's Application to Submit Additional Evidence", 28 January 2014, ICC-01/05-01/08-2948-Red. The Chamber issued its decision on the prosecution's application on 2 April 2014: Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029.

<sup>41</sup> ICC-01/05-01/08-3020-Red, paragraph 56.

case]”;<sup>42</sup> or (iv) “the conduct of the Prosecution, and existence of potential prejudice to the Defence”.<sup>43</sup>

17. The defence argues that any attempt to rely on the relevance of the Requested Information in case ICC-01/05-01/13 to justify non-disclosure in the *Bemba* case is “entirely illogical and unsupported by the case law and practice of the Court.”<sup>44</sup>

18. The prosecution submits that the information the defence seeks “does not contain any items under Article 67(2) of the [Statute] and is not material to the preparation of the defence under Rule 77 of the Rules”.<sup>45</sup> The prosecution alleges that the Defence Request is a “thinly-veiled attempt to prematurely discover confidential information about the Prosecution’s ongoing investigation of Article 70 offences” and notes that the information has been or will be disclosed to the defence teams and the suspects in case ICC-01/05-01/13, including Mr Bemba.<sup>46</sup>

19. The prosecution further submits that the defence’s requests “are manifestly outside the scope of the Bemba case and impermissibly [seek] to intrude into the record and evidence of a separate case, which is handled independently by the Court and involves a separate defence team”.<sup>47</sup> While the prosecution acknowledges that it sought admission of a “confined pool of evidence”<sup>48</sup> emanating from case ICC-01/05-01/13, it

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<sup>42</sup> ICC-01/05-01/08-3020-Red, paragraph 55.

<sup>43</sup> ICC-01/05-01/08-3020-Red, paragraph 56.

<sup>44</sup> ICC-01/05-01/08-3020-Red, paragraph 57. *See also* ICC-01/05-01/08-3020-Red, paragraphs 51 to 61.

<sup>45</sup> ICC-01/05-01/08-3039, paragraph 2.

<sup>46</sup> ICC-01/05-01/08-3039, paragraph 2.

<sup>47</sup> ICC-01/05-01/08-3039, paragraph 10.

<sup>48</sup> ICC-01/05-01/08-3039, paragraph 10

argues that since the Chamber rejected the Prosecution's Application to Submit Additional Evidence,<sup>49</sup> "none of the information sought bears on any issue in [the *Bemba*] proceedings and none of the information is material for the Defence's preparation of the remaining tasks of the case, especially at this late stage".<sup>50</sup> The prosecution also submits that it did not contact any defence witnesses prior to the close of the defence case.<sup>51</sup>

20. Regarding the RFAs, the prosecution responds that the defence "fails to substantiate any basis to obtain Prosecution RFAs to the DRC in matters pertaining to the Defence".<sup>52</sup> The prosecution notes the defence's arguments that the RFAs are automatically material to the preparation of the defence because they pertain to the defence case. The prosecution argues that such an interpretation "upends" the Appeals Chamber's jurisprudence and would "create the very unlimited disclosure of information the Appeals Chamber" warned against.<sup>53</sup> The prosecution states that RFAs "do not constitute, in principle, evidence and are not generally material to the preparation of the Defence".<sup>54</sup> The prosecution submits that the defence's request to compel the production of all documents related to the prosecution's RFAs to the DRC is "unsubstantiated and fails to establish *prima facie* that the information sought is material to the preparation of the Defence".<sup>55</sup>

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<sup>49</sup> See ICC-01/05-01/08-2910, ICC-01/05-01/08-3029.

<sup>50</sup> ICC-01/05-01/08-3039, paragraphs 10 to 11.

<sup>51</sup> ICC-01/05-01/08-3039, paragraph 13.

<sup>52</sup> ICC-01/05-01/08-3039, paragraph 16.

<sup>53</sup> ICC-01/05-01/08-3039, paragraph 17.

<sup>54</sup> ICC-01/05-01/08-3039, paragraph 17.

<sup>55</sup> ICC-01/05-01/08-3039, paragraph 3.

21. The defence replies that the prosecution has a continuing obligation throughout the proceedings to disclose Article 67(2) evidence and Rule 77 material as soon as practicable.<sup>56</sup> The defence adds that the closure of evidence in the *Bemba* case does not relieve the prosecution of its disclosure obligations,<sup>57</sup> and that “admissibility is not a precondition for disclosure”.<sup>58</sup>

22. As regards the RFAs, the defence replies that the prosecution has never contested the “disclosability” of information concerning RFAs and has not provided justification for its refusal to disclose the material in the *Bemba* case.<sup>59</sup> The defence further argues that matters which are material to its preparation “extend, *inter alia*, to novel matters tending to support the credibility of Defence evidence already called, and material tending to show impropriety, *mala fides* or even illegality on the part of the Prosecution”.<sup>60</sup> The defence asserts that “[t]he putative role of the DRC in any investigations conducted by the Prosecution into the credibility of Defence evidence and Defence witnesses is material to Defence submissions concerning the security and protection of Defence witnesses [...as well as to] the credibility and probative value of any leads or information proffered by the DRC, which are being used by the Prosecution to impugn the Defence case”.<sup>61</sup>

23. In reply to the prosecution’s arguments regarding the defence’s request for information concerning defence witnesses, the defence submits that

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<sup>56</sup> ICC-01/05-01/08-3055-Red, paragraphs 2, 5, and 17.

<sup>57</sup> ICC-01/05-01/08-3055-Red, paragraph 4 and 17.

<sup>58</sup> ICC-01/05-01/08-3055-Red, paragraph 5.

<sup>59</sup> ICC-01/05-01/08-3055-Red, paragraph 6.

<sup>60</sup> ICC-01/05-01/08-3055-Red, paragraph 7.

<sup>61</sup> ICC-01/05-01/08-3055-Red, paragraph 9.

such information is *prima facie* relevant to the party that called the witness.<sup>62</sup> The defence submits that “[g]iven the nature and scope of the Article 70 allegations, the Defence witnesses were evidently questioned in relation to the Defence team, Defence evidence in the Main case, and potentially, Defence strategy and communications in the Main case”.<sup>63</sup> The defence submits that information gathered from defence witnesses during the Article 70 investigation could confirm the credibility of defence witnesses.<sup>64</sup> The defence further submits that disclosure of statements taken in case ICC-01/05-01/13 from witnesses called in the *Bemba* case would allow the defence to ascertain whether the prosecution has deprived it of the ability to submit relevant and probative evidence before expiration of the deadline for submission of evidence.<sup>65</sup>

24. First, concerning the prosecution’s submissions as to its disclosure obligations,<sup>66</sup> the Chamber notes that indeed, admissibility is not a precondition for disclosure.<sup>67</sup> Whether the prosecution intends to submit an item as evidence in a trial is irrelevant to its obligations under Article 67(2) of the Statute and the materiality prong of Rule 77 of the Rules. Further, the prosecution’s obligation does not end at the close of evidence but continues until the conclusion of the trial.

25. Turning to the defence’s request for information relating to the protection of witnesses,<sup>68</sup> the Chamber does not consider that the information’s *prima*

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<sup>62</sup> ICC-01/05-01/08-3055-Red, paragraphs 10 to 17.

<sup>63</sup> ICC-01/05-01/08-3055-Red, paragraph 12.

<sup>64</sup> ICC-01/05-01/08-3055-Red, paragraph 14.

<sup>65</sup> ICC-01/05-01/08-3055-Red, paragraph 17.

<sup>66</sup> See ICC-01/05-01/08-3039, paragraph 10.

<sup>67</sup> ICC-01/05-01/08-3070, paragraphs 19 to 27.

<sup>68</sup> ICC-01/05-01/08-3020-Red, paragraph 28, 55, and 56.

*facie* materiality has been established. The defence's interest in ensuring the protection of former defence witnesses does not necessarily equate to such information being material within the meaning of Rule 77 of the Rules. The Chamber observes that because of the information received from the anonymous informant, the prosecution did initiate investigative steps.<sup>69</sup> The Chamber also notes that the prosecution has a statutory duty, pursuant to Articles 54(1)(b) and 68(1), to take measures to respect the interests and personal circumstances and protect the safety, physical and psychological well-being of victims and witnesses in the course of its investigations. Nothing suggests that this duty was not upheld in the present case.

26. Further, Pre-Trial Chamber II, which oversees case ICC-01/05-01/13, is bound by Article 68(1) to ensure the "safety, physical and psychological well-being, dignity and privacy" of all witnesses, including any witnesses in the *Bemba* case that come under its purview.

27. The Chamber will now consider the defence's request for information on the circumstances of the prosecution's contact with witnesses called by the defence in the *Bemba* case; by extension, this also includes information on the anonymous informant. The Chamber recalls its finding in Decision 3070 that interview notes, statements, or transcripts of interviews generated during the course of any contact between witnesses called by the defence and the prosecution in the context of the Article 70 investigation are material to the preparation of the defence in the *Bemba*

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<sup>69</sup> ICC-01/05-01/08-2548-Red3.

case.<sup>70</sup> Accordingly, the Chamber ordered disclosure, subject to any applicable restrictions.

28. In the present case, however, on the basis of the information before it, the Chamber finds that the defence has not established the *prima facie* materiality of other information relating to such contacts, including the circumstances surrounding them. The Chamber considers that the submissions made by the defence in this regard relate to case ICC-01/05-01/13 but do not, at present, support the materiality of such information to the preparation of the defence in the *Bemba* case. The Chamber notes that although Decision 3070 explicitly addressed statements taken for case ICC-01/05-01/13 of witnesses previously called in the *Bemba* case, the Chamber's reasoning and the relief granted, is not limited to that specific material.

29. Turning to the information concerning RFAs to national authorities, the Chamber considers that the materiality of such information to the preparation of the defence must be assessed on a case-by-case basis. For information concerning RFAs to be material to the preparation of the defence, such information must satisfy the criteria for materiality set forth in paragraph 11 above. In the present case, the defence makes general pleadings related to information concerning RFAs. However, 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

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<sup>70</sup> ICC-01/05-01/08-3070, paragraphs 19 and 24.



assistance directed to the DRC, which pertain to the Defence case”.<sup>71</sup> On 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.

30. In light of the above, the Chamber rejects the defence’s First Request.

*Second Request*

31. In its Second Request, the defence asks the Chamber to “[remain seized] of the need to sanction the Prosecution by either excluding any incriminating material or charges to which the Requested Information relates, or drawing inferences either against the Prosecution or in favour of the Defence”.<sup>72</sup>

32. The defence submits that the prosecution’s “curt and evasive” responses to the defence’s requests have “impeded the ability of the Defence to investigate pertinent issues and raise relevant [matters] to the Trial Chamber in a timely manner,”<sup>73</sup> and that the prosecution’s failure to disclose “has already had a significant impact on the expeditiousness of the proceedings”.<sup>74</sup> The defence further alleges that the prosecution’s stance of refusing to disclose material that is relevant to case ICC-01/05-01/13 “constitute[s] an illegal abrogation of the Prosecution’s disclosure obligations” and “also evidences the strong probability that there is other exculpatory or relevant material, which the Prosecution should have

<sup>71</sup> ICC-01/05-01/08-3020-Red, paragraph 43.

<sup>72</sup> ICC-01/05-01/08-3020-Red, paragraph 67.

<sup>73</sup> ICC-01/05-01/08-3020-Red, paragraph 62.

<sup>74</sup> ICC-01/05-01/08-3020-Red, paragraph 63.

disclosed..., but which it has not in fact disclosed”.<sup>75</sup> The defence submits, the “case is therefore tainted by a presumption that there may be crucial exculpatory information, which is either known to the Prosecution or in its possession, which has not been brought to the attention of the Defence”.<sup>76</sup>

33. The prosecution responds that the defence’s argument rests on the presumption that the prosecution seeks to submit any of the material the defence requests into evidence, which the prosecution does not.<sup>77</sup> The prosecution reiterates that the defence’s requests are related entirely to case ICC-01/05-01/13 and that all suspects in that case are represented by counsel and will receive the relevant disclosure.<sup>78</sup>

34. The Chamber notes Pre-Trial Chamber II’s decision permitting Mr Bemba to share his access to the record of case ICC-01/05-01/13 with his Counsel in the *Bemba* case.<sup>79</sup> The defence’s access to materials in case ICC-01/05-01/13 undermines its allegations of prejudice to the accused’s interests.

35. The defence appears to seek a future relief barring the prosecution from using material from case ICC-01/05-01/13 in the *Bemba* case, or drawing inferences in favour of the defence or against the prosecution, if such material should have previously been disclosed to the defence under the statutory framework. As the prosecution does not seek to use such material at the present time, the Chamber declines to decide on a

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<sup>75</sup> ICC-01/05-01/08-3020-Red, paragraph 64.

<sup>76</sup> ICC-01/05-01/08-3020-Red, paragraph 64.

<sup>77</sup> ICC-01/05-01/08-3039, paragraph 18.

<sup>78</sup> ICC-01/05-01/08-3039, paragraph 18.

<sup>79</sup> Decision on the “Defence Request for access to confidential transcripts and filings” dated 1 April 2014 submitted by the Defence for Jean-Pierre Bemba Gombo in case ICC-01/05-01/08, 15 April 2014, ICC-01/05-01/13-338.

hypothetical concern. In light of the above, the Chamber rejects the defence's Second Request.

*Third Request*

36. The defence notes the prosecution's disclosure of exculpatory materials in case ICC-01/05-01/13, including a media article and other documents related to Mr Arido ("Arido Materials").<sup>80</sup> The defence submits that these materials must also be disclosable in the *Bemba* case in view of the link the prosecution has made between the Article 70 investigation and the credibility of defence evidence in the *Bemba* case.<sup>81</sup>
37. The defence notes that in case ICC-01/05-01/13, the prosecution makes allegations about Mr Arido's role in the production of allegedly falsified documents ("CAR documents") used in the *Bemba* case.<sup>82</sup> The defence further notes that the CAR documents "were produced by the Defence" in the *Bemba* case and used during the testimony of several witnesses in the present proceedings.<sup>83</sup> The defence submits, "[a]ny materials or documents proving or tending to prove that [the CAR documents] are authentic contemporaneous records of the events central to the [*Bemba* case] is undoubtedly also disclosable as exculpatory to the Defence".<sup>84</sup>
38. The defence argues that even if the Arido Materials do not concern the CAR documents, the prosecution has framed its Article 70 investigations

<sup>80</sup> ICC-01/05-01/08-3033-Red, paragraph 3.

<sup>81</sup> ICC-01/05-01/08-3033-Red, paragraph 3.

<sup>82</sup> ICC-01/05-01/08-3033-Red, paragraph 4.

<sup>83</sup> ICC-01/05-01/08-3033-Red, paragraph 4.

<sup>84</sup> ICC-01/05-01/08-3033-Red, paragraph 10.

as a “scheme” or “conspiracy” headed by Mr Bemba.<sup>85</sup> Thus, according to the defence, Mr Bemba is “inextricably linked to the alleged criminal activity of Mr Arido”.<sup>86</sup> The defence further submits that given the prosecution’s position that the existence of a scheme affected the probative value and credibility of the defence’s evidence in the *Bemba* case, “material or documents which disprove or tend to disprove the involvement or criminal liability of Mr Arido accordingly also affects the overall credibility of Defence evidence and is undoubtedly disclosable”.<sup>87</sup> Further, the defence argues that information exculpating Mr Arido from any “‘scheme’ or ‘conspiracy’ may also have relevance to chain of custody issues, and potential arguments that the Prosecution may raise in their final trial brief or closing submissions”.<sup>88</sup>

39. The prosecution responds that the defence “incorrectly assumes that such Article 67(2) material bears on the alleged falsity of Defence documents or has a correlative bearing on Mr. Bemba’s individual criminal responsibility in this case”.<sup>89</sup> In the Prosecution Response, the prosecution submits that “the nature of the evidence disclosed to Mr. Arido does not concern the alleged falsity of Defence documents or Mr. Bemba; rather, the evidence concerns the strength of the Prosecution’s evidence concerning Mr Arido’s consciousness of guilt and therefore [bear] on no live or contestable issue in [the *Bemba* case]”.<sup>90</sup>

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<sup>85</sup> ICC-01/05-01/08-3033-Red, paragraph 11.

<sup>86</sup> ICC-01/05-01/08-3033-Red, paragraph 13.

<sup>87</sup> ICC-01/05-01/08-3033-Red, paragraph 13.

<sup>88</sup> ICC-01/05-01/08-3033-Red, paragraph 13.

<sup>89</sup> ICC-01/05-01/08-3039, paragraph 19.

<sup>90</sup> ICC-01/05-01/08-3039, paragraph 19.

40. As a preliminary matter, the Chamber notes that the Third Request was primarily based on a speculative assumption on the nature of the Arido materials. On the basis of the prosecution's submissions,<sup>91</sup> this assumption is ill-founded.
41. The Chamber notes that Mr Arido is not on trial in the *Bemba* case. Additionally, 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.
42. In the present case, the Chamber finds that materials related to the strength of Mr Arido's consciousness of guilt do not fall within the scope of either Article 67(2) or Rule 77 of the Rules for the purpose of the *Bemba* case. In light of the above, the Chamber rejects the defence's request for disclosure of "any and all" exculpatory materials related to Mr Arido. However, the prosecution is of course obligated to disclose materials related to Mr Arido if they (i) could undermine the prosecution case, (ii) support a line of argument of the defence, or (iii) significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the *Bemba* case.

#### *Fourth Request*

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<sup>91</sup> ICC-01/05-01/08-3039, paragraph 19.

43. In its Fourth Request, the defence asks for an order requiring the prosecution to review all materials in its possession gathered during its Article 70 investigation to ensure compliance with disclosure obligations.<sup>92</sup> The defence expresses concern that other materials in case ICC-01/05-01/13, in addition to the materials identified in the Defence Further Request, may also be subject to disclosure.<sup>93</sup>

44. The Chamber notes the prosecution's disclosure obligations under the statutory framework. The Chamber further notes Decision 3070 and the present Decision's clarification of the prosecution's disclosure obligations. Further, the Chamber recalls its order in Decision 3070 that the prosecution "permit the defence to inspect all relevant material falling within the scope of Article 67(2) of the Statute and Rule 77 of the Rules, subject to restrictions on disclosure provided for in the Statute and Rules 81 and 82 of the Rules."<sup>94</sup> In light of the above, the Chamber rejects the defence's Fourth Request.

*The prosecution's submissions as to conflict of interest*

45. The prosecution argues that a potential conflict of interest exists concerning defence Counsel due to their positions within the defence team when the Article 70 offences were allegedly committed and "accordingly may be called as witnesses in the Article 70 case".<sup>95</sup> The defence objects to the prosecution's submission regarding defence Counsel. The defence submits that the prosecution has not provided any material that suggests

<sup>92</sup> ICC-01/05-01/08-3033-Red, paragraph 16.

<sup>93</sup> ICC-01/05-01/08-3033-Red, paragraph 14.

<sup>94</sup> ICC-01/05-01/08-3070, paragraph 30.

<sup>95</sup> ICC-01/05-01/08-3039, paragraph 15.

defence Counsel is conflicted from continuing their representation of Mr Bemba.<sup>96</sup> The defence further submits that the prosecution alleges that the defence Counsel's presence in the *Bemba* case affects Mr Bemba's right to proper disclosure and that if that "submission is maintained and/or upheld, then Counsel for Mr Bemba would be forced to withdraw".<sup>97</sup>

46. The Chamber considers that the defence Counsel's possible role in further proceedings in case ICC-01/05-01/13 is not relevant to the determination of disclosure obligations in the *Bemba* case. Given that the Prosecution Response, the Defence Reply, and the present Decision are available to the public, the Chamber is of the view that the record of the case enables the public to properly contextualise the prosecution's submissions. As such, the Chamber sees no reason to take any further action.

47. In view of the above, the Chamber hereby:

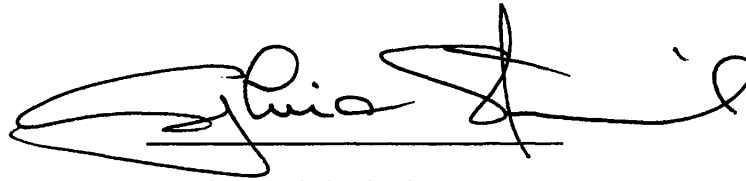
- a. REJECTS the defence's First, Second, Third and Fourth Requests;
- b. ORDERS the prosecution to lift the redaction to paragraph 38(e) of Document 2548 and to file another public redacted version of the document; and
- c. ORDERS the reclassification of Decision 3070 as public.

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<sup>96</sup> ICC-01/05-01/08-3055-Red, paragraph 19.

<sup>97</sup> ICC-01/05-01/08-3055-Red, paragraph 21.

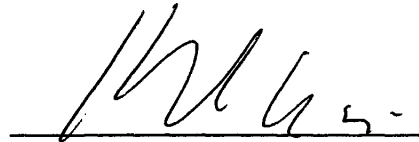
Done in both English and French, the English version being authoritative.



**Judge Sylvia Steiner**



**Judge Joyce Aluoch**



**Judge Kuniko Ozaki**

Dated this 2 July 2014

At The Hague, The Netherlands