

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 21 October 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***

**URGENT
Confidential**

Decision on "Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure" (ICC-01/05-01/08-3159-Conf)

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

The Office of the Prosecutor

Ms Fatou Bensouda

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Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

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Legal Representatives of the Victims

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REGISTRY

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**Victims Participation and Reparations Other
Section**

Trial Chamber III ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case"), hereby issues the following Decision on 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure' (ICC-01/05-01/08-3159-Conf) ("Decision").

I. Background¹

1. On 3 October 2013, the Office of the Prosecutor ("prosecution") filed its confidential, *ex parte*, prosecution and Victims and Witnesses Unit ("VWU") only, "Information on contacts of Witnesses 169 and 178 with other witnesses [...]",² informing the Chamber that Witness P-169 sent letters to, amongst others, the prosecution and the VWU ("2013 Letters").³ In the 2013 Letters, the witness, *inter alia*, listed alleged outstanding claims, including loss of income and "money promised by the Prosecutor for witnesses", and provided a list of the identities and contact details of 22 individuals, including 21 protected witnesses called by the prosecution ("Relevant Witnesses"), many of whom he alleged were contacted and gathered by Witness P-178 to "look at loss of income claims".⁴
2. On 25 October 2013, the Chamber issued its "Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located

¹ In view of the number of filings related to the conduct of Witness P-169, the Chamber will confine its summary of the procedural background to those submissions and findings that are of direct relevance to the present Decision.

² Information on contacts of Witnesses 169 and 178 with other witnesses [...], 3 October 2013, ICC-01/05-01/08-2827-Conf-Exp and confidential *ex parte* Annexes A and B. A second confidential lesser redacted version of Information on contacts of Witnesses 169 and 178 with other witnesses located [REDACTED], 3 October 2013, (ICC-01/-05-01/08-2827-Conf-Exp), ICC-01/05-01/08-2827-Conf-Red2 and confidential redacted Annexes A and B were filed on 9 January 2014.

³ The letters were appended as Annexes A and B to the prosecution's filing and appear to be addressed to several Court officials and several external parties. Annex A includes a letter apparently sent by Witness 169 to the prosecution and an email sent by Witness 169 on 7 June 2013. Annex B includes the same letter apparently sent by Witness 169 to the prosecution, a letter apparently sent by Witness 169 to the VWU, as well as an email apparently sent by Witness 169 on 10 June 2013.

⁴ ICC-01/05-01/08-2827-Conf-Red2, paragraphs 7, 9, and 10.

[...],⁵ ("Decision 2845") in which it, *inter alia*, determined that any information relating to the allegations made by Witness P-169 as to "outstanding claims" and "money promised by the Prosecutor for witnesses" may be material for the preparation of the defence of Mr Jean-Pierre Bemba ("defence") and should therefore be disclosed under Rule 77 of the Rules of Procedure and Evidence ("Rules").⁶

3. On 11 September 2014, the prosecution filed its "Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-169".⁷ The prosecution informed the Chamber that the VWU had transmitted, on 3 September 2014, another letter allegedly from Witness P-169 ("5 August 2014 Letter"), which the prosecution had disclosed to the defence on 4 September 2014 pursuant to Article 67(2) of the Statute.⁸ The prosecution explained that the 5 August 2014 Letter, addressed to the Secretary General of the United Nations, alleges, *inter alia*, that Witness P-169 "possesses evidence of corruption and ill-treatment of Prosecution witnesses".⁹ Consequently, the prosecution sought the Chamber's limited intervention with respect to the potential admission into

⁵ Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [...]' (ICC-01/05-01/08-2827-Conf-Exp)", 25 October 2013, ICC-01/05-01/08-2845-Conf-Exp. A confidential redacted version was filed on 5 November 2013: Confidential redacted version of "Decision on the prosecution's 'Information on contacts of Witnesses 169 and 178 with other witnesses located [REDACTED]' (ICC-01/05-01/08-2827-Conf-Exp)" of 25 October 2013, 5 November 2013, ICC-01/05-01/08-2845-Conf-Red.

⁶ ICC-01/05-01/08-2845-Conf-Red, paragraph 10.

⁷ Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-169", 11 September 2014, ICC-01/05-01/08-3138-Conf-Exp along with Conf-Exp-AnxA. A confidential redacted version was filed on 12 September 2014: ICC-01/05-01/08-3138-Conf-Red. Pursuant to a 15 September 2014 Chamber's order, Annex A was reclassified as confidential: ICC-01/05-01/08-3138-Conf-AnxA. See Email from the Chamber to CMS of 15 September 2014 at 09.01.

⁸ See Prosecution's Communication of Evidence pursuant to Article 67(2) of the Rome Statute and confidential Annex A, 5 September 2014, ICC-01/05-01/08-3133, paragraph 1 and ICC-01/05-01/08-3133-Conf-AnxA. The disclosed document bears the ERN CAR-OTP-0083-1212 and the annex bears the ERN CAR-OTP-0083-1214.

⁹ ICC-01/05-01/08-3138-Conf-Red, paragraph 2.

evidence of the 5 August 2014 Letter and to prevent Witness P-169's further communication of sensitive information.¹⁰

4. On 11 September 2014, the defence filed its "Defence Urgent Submission on the 5 August Letter" ("Defence Submission").¹¹ The defence requested that the Chamber, *inter alia*,¹² admit the 5 August 2014 Letter as evidence in the proceedings and decline to rely on the testimony of Witness P-169 or the Relevant Witnesses in its deliberations pursuant to Article 74 of the Statute. The defence requested, if the Chamber declined to grant these requests, that it: admit the 5 August 2014 Letter as evidence in the proceedings; grant the defence request for leave to file supplemental submissions to Mr Bemba's Closing Brief on the basis of this additional evidence; and order that the VWU liaise with the Defence to facilitate contact between Witness P- 169 and the Defence with a view to facilitating the potential recall of P-169 and other witnesses before the Chamber.¹³
5. On 16 September 2014, the defence filed its "Defence Submission on the 'Prosecution's Information to Trial Chamber II on issues involving Witness CAR-OTP-PPPP-0169' [11] September 2014, ICC-01/05-01/08-3138-Conf-Exp" ("Defence Response"),¹⁴ in which it requested, *inter alia*, that the Chamber order

¹⁰ ICC-01/05-01/08-3138-Conf-Red, paragraph 4.

¹¹ Defence Urgent Submission on the 5 August Letter, 11 September 2014, ICC-01/05-01/08-3139-Conf, along with confidential Annexes A and B.

¹² ICC-01/05-01/08-3139-Conf, paragraph 52.

¹³ ICC-01/05-01/08-3139-Conf, paragraph 52.

¹⁴ Defence Submission on the "Prosecution's Information to Trial Chamber II on issues involving Witness CAR-OTP-PPPP-0169" [11] September 2014, ICC-01/05-01/08-3138-Conf-Exp, 16 September 2014, ICC-01/05-01/08-3146-Conf.

the VWU or the prosecution to disclose the “covering email referred to in paragraph 11 of the Prosecution’s *ex parte* filing”.¹⁵

6. On 16 September 2014, the prosecution filed its “Prosecution’s Response to the ‘Defence Urgent Submission on the 5 August letter’”,¹⁶ in which the prosecution asked that the Chamber reject the Defence Submission in part.¹⁷
7. On 17 September 2014, Me Douzima filed her “Rectificatif à la Réponse de la Représentante légale des victimes, Me. Marie-Edith Douzima-Lawson, à la ‘Defen[c]e Urgent Submission on the 5 August Letter’, ICC-01/05-01/08-3139-Conf”,¹⁸ in which she requested, *inter alia*, that the Chamber reject the defence’s requests to disregard Witness P-169 and the Relevant Witnesses’ testimonies.
8. On 23 September 2014, the Chamber convened a status conference to hear additional submissions from the parties, the legal representative and the Registry, including the VWU, on the 5 August 2014 Letter and related issues.¹⁹
9. On 24 September 2014, the Chamber sent an email in which it, *inter alia*, ordered the Registry to file the cover email of the 5 August 2014 Letter as a confidential document.²⁰

¹⁵ ICC-01/05-01/08-3146-Conf, paragraph 11.

¹⁶ Prosecution’s Response to the “Defence Urgent Submission on the 5 August letter”, 16 September 2014, ICC-01/05-01/08-3144-Conf.

¹⁷ ICC-01/05-01/08-3144-Conf, paragraph 1.

¹⁸ “Rectificatif à la Réponse de la Représentante légale des victimes, Me. Marie-Edith Douzima-Lawson, à la ‘Defen[c]e Urgent Submission on the 5 August Letter’, ICC-01/05-01/08-3139-Conf”, 17 September 2014, ICC-01/05-01/08-3145-Conf-Corr. This document is a corrigendum to Me Douzima’s initial filing, the “Réponse de la Représentante légale des victimes, Me. Marie-Edith Douzima-Lawson, à la ‘Defense Urgent Submission on the 5 August Letter’, ICC-01/05-01/08-3195-Conf”, 16 September 2014, ICC-01/05-01/08-3145-Conf.

¹⁹ Transcript of Hearing on 23 September 2014, ICC-01/05-01/08-T-360-CONF-ENG ET. See Order convening a status conference, 18 September 2014, ICC-01/05-01/08-3147.

²⁰ The document was filed on 25 September 2014: Victims and Witnesses Unit’s submission of the email transmitting the letter dated 5 August 2014, 25 September 2014, ICC-01/05-01/08-3151-Conf and Confidential Annex.

10. On 25 September 2014, the prosecution filed its "Prosecution's Additional Information on P169's Communication on 23 August 2014" ("Additional Submissions"),²¹ in which it clarified that the 5 August 2014 Letter had been received by a staff member of the prosecution's Operational Support Unit ("OSU") via email to a non icc-cpi.int address on 23 August 2014. According to the prosecution, this email address was used for security purposes from April 2012 until November 2012. On 6 November 2012, the prosecution suspended its use of this email address and Witness P-169 was provided with an alternate means to communicate securely with the prosecution. Accordingly, the prosecution ceased to routinely check the email account, and it was only on 23 September 2014 that the prosecution discovered the email containing the 5 August 2014 Letter sent by Witness P-169 one month earlier.²²
11. On 2 October 2014, the Chamber issued its "Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter' (ICC-01/05-01/08-3139-Conf) ("Decision 3154").²³ The Chamber, *inter alia*, (i) ordered the recall of Witness P-169 to testify at the seat of the Court; (ii) ordered the reopening of the presentation of evidence for the limited purpose of hearing Witness P-169 in relation to issues arising out of his various allegations and issues of witness credibility; and (iii) deferred any decision on

²¹ Prosecution's Additional Information on P169's Communication on 23 August 2014, 25 September 2014, ICC-01/05-01/08-3150-Conf-Exp. A confidential redacted version was filed on 26 September 2014: Confidential Redacted Version of "Prosecution's Additional Information on P169's Communication on 23 August 2014", 25 September 2014, ICC-01/05-01/08-3150-Conf-Exp, 26 September 2014, ICC-01/05-01/08-3150-Conf-Red.

²² ICC-01/05-01/08-3150-Conf-Red, paragraphs 2 to 5.

²³ Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter' (ICC-01/05-01/08-3139-Conf), 2 October 2014, ICC-01/05-01/08-3154-Conf. A redacted version was filed on 10 October 2014, ICC-01/05-01/08-3154-Red.

whether it would rely on the testimony of Witness P-169 or the Relevant Witnesses.

The 11 June 2014 Letter

12. On 7 and 8 October 2014, the prosecution disclosed 26 items under Rule 77 as well as one item pursuant to Article 67(2) of the Statute ("7 October Disclosure").²⁴ The item disclosed pursuant to Article 67(2) of the Statute is a letter dated 11 June 2014 ("11 June 2014 Letter"), signed by Witness P-169 and addressed to the Secretary General of the United Nations and apparently copied to several Court officials and external parties.²⁵

The Defence Motion

13. On 9 October 2014, the defence filed its "Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure" ("Defence Motion").²⁶
14. First, the defence submits that the 7 October Disclosure contains numerous documents concerning payments made by the prosecution to Witness P-169, including a payment which "goes beyond the ordinary requirements of subsistence" and is not an "ordinary expense".²⁷ According to the defence, "this payment cannot be reconciled with the prosecution's earlier statement that: 'Any request for benefits and/or payments going beyond the reimbursement of

²⁴ See Prosecution's Communication of Evidence disclosed to the Defence on 8 October 2014 pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, 8 October 2014, ICC-01/05-01/08-3158 and confidential Annexes A to C. Courtesy copies of the disclosed items were circulated via email on 7 October at 18.07.

²⁵ CAR-OTP-0083-1303.

²⁶ Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure, 9 October 2014, ICC-01/05-01/08-3159-Conf.

²⁷ ICC-01/05-01/08-3159-Conf, paragraphs 15 and 16.

ordinary expenses, potentially affecting the witnesses' credibility, and any related contact between Prosecution witnesses and the Court in the instant case has involved the VWU and has been submitted to the VWU that deals with these matters as part of its mandate.'"²⁸ The defence submits that by failing to disclose the documents concerning these payments at the time of their creation, the prosecution breached its disclosure obligations under Rule 77 of the Rules.²⁹ The defence posits that this violation has caused prejudice to the accused, since had the material been disclosed in a timely manner, "it would have given important context to the allegations made in the [2013 Letters], and undoubtedly have formed part of the Defence submissions (and the Chamber's deliberations) on these letters in November 2013".³⁰ The defence further submits that "Mr. Bemba was deprived of seeking the admission of these payments during the evidential phase of the case, and then making submissions on their effect on the credibility of P-169 in his Closing Brief".³¹

15. The defence also submits that the prosecution is in breach if its disclosure obligations by (i) failing to disclose the 11 June 2014 Letter which according to the ringtail chain of custody had been in the possession of "OTP-OSU" since 13 June 2014; and (ii) "withholding" the covering email of the 11 June 2014 Letter ("Covering Email"), despite knowing that this was disclosable, which the defence argues has caused prejudice to the accused.³²

²⁸ ICC-01/05-01/08-3159-Conf, paragraphs 15 to 16. The defence refers to ICC-01/05-01/08-2897-Conf, paragraph 17.

²⁹ ICC-01/05-01/08-3159-Conf, paragraph 17.

³⁰ ICC-01/05-01/08-3159-Conf, paragraph 18.

³¹ ICC-01/05-01/08-3159-Conf, paragraph 18.

³² ICC-01/05-01/08-3159-Conf, paragraphs 19 and 20. The defence refers to the Chamber's ruling in Decision 3154, ICC-01/05-01/08-3154-Conf, paragraph 34.

16. The defence submits that the non-disclosure of payments to Witness P-169 that “have the potential to affect his credibility, and the non-disclosure of correspondence in which he evinces an intention to ‘re-consider’ his testimony, make an even stronger case for the Chamber declining to rely on his testimony, as a remedy for the prejudice suffered as a result of the Prosecution’s non-disclosure”.³³ The defence asserts that the Chamber should “reprimand” the prosecution for its “repeated failures” to comply with its disclosure obligations and order the prosecution to conduct a review of its case file and certify to the Chamber that all disclosable material has been provided to the defence.³⁴
17. Second, the defence submits that on the basis of the Additional Submissions, it is now aware that the prosecution “has been in what appears to be regular contact with P-169, through both a non ‘icc-cpi-int’ email address, and then later through an official ICC address”.³⁵ The defence avers that all communications from Witness P-169 are material to the preparation of the defence and are necessary to enable the defence to question Witness P-169 on “issues arising out of Witness P-169’s various allegations and issues of witness credibility”.³⁶ According to the defence, this is particularly relevant in light of the legal representative’s challenge to the authenticity of the 5 August 2014 Letter.³⁷
18. Moreover, the defence submits that all post-testimony contact with the Relevant Witnesses is also disclosable since it is relevant to the preparation of the

³³ ICC-01/05-01/08-3159-Conf, paragraph 21.

³⁴ ICC-01/05-01/08-3159-Conf, paragraphs 22 and 23.

³⁵ ICC-01/05-01/08-3159-Conf, paragraph 24. The defence quotes this wording from ICC-01/05-01/08-3150-Conf-Red, paragraph 4.

³⁶ ICC-01/05-01/08-3159-Conf, paragraph 27. The defence quotes this wording from Decision 3154, ICC-01/05-01/08-3154-Conf, paragraph 31.

³⁷ ICC-01/05-01/08-3159-Conf, paragraph 28.

defence's examination of Witness P-169, given his claims concerning contact with these witnesses.³⁸

19. Third, in view of Witness P-169's assertion that the Relevant Witnesses are ready to bring evidence that their testimony was suborned, the defence submits that even "ordinary" payments are material to the defence's preparation of the examination of Witness P-169 and should be disclosed.³⁹

20. Lastly, the defence requests an abridgement of the time for a prosecution response and either an expedited decision or postponement of Witness P-169's testimony.⁴⁰ As abridgement of the time for the prosecution's response has already been ordered,⁴¹ and the present Decision issued, the Chamber considers these requests to be moot.

21. In light of these submissions, the defence requests, *inter alia*, that the Chamber:⁴²

ORDER the Prosecution to disclose immediately the covering email of the Letter of 11 June [(“First Request”)];

ORDER the Prosecution to disclose immediately all email and other written exchanges with P-169, and any other video or audio recordings, minutes and/or notes of the Prosecution's conversations with P-169, whether in the presence of VWU or otherwise [(“Second Request”)];

ORDER the Prosecution to disclose immediately all email and other written exchanges with any of the 21 witnesses listed in the annex to the Letter of 5 August, and any other video or audio recordings, minutes and/or notes of the Prosecution's conversations with these witnesses, whether in the presence of VWU or otherwise [(“Third Request”)];

³⁸ ICC-01/05-01/08-3159-Conf, paragraphs 29 to 30.

³⁹ ICC-01/05-01/08-3159-Conf, paragraphs 31 to 32.

⁴⁰ ICC-01/05-01/08-3159-Conf, paragraphs 33 to 34.

⁴¹ Email from the Chamber on 9 October 2014 at 14.00.

⁴² ICC-01/05-01/08-3159-Conf, paragraph 35.

ORDER the Prosecution to disclose immediately all payments and other forms of assistance given by the Prosecution to P-169 and the 21 witnesses listed in the annex of the Letter of 5 August 2014, as well as all correspondence and documentation concerning these payments [("Fourth Request")];

REPRIMAND the Prosecution for its failure to comply with its disclosure obligations in the present case [("Fifth Request")];

GRANT the Defence request for the Chamber not to rely on the testimony of P-169 for an incriminating finding of facts against Mr. Bemba [("Sixth Request")];

ORDER the Prosecution to conduct a review of its casefile and certify before the Chamber that all disclosable material has been provided to the Defence [("Seventh Request")];

ORDER the abridgement of the time for any Prosecution response to the present request [("Eighth Request")]; and

DELIVER an expedited ruling on the present request [("Ninth Request")], and/or **ORDER** an adjournment the testimony of P-169 accordingly [("Alternative Ninth Request")].

The Prosecution Response

22. On 10 October 2014,⁴³ the prosecution filed its "Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'",⁴⁴ in which it asserts that it has complied with its on-going disclosure obligations⁴⁵ and urges the Chamber to dismiss the Defence Motion in its entirety.⁴⁶ The prosecution, *inter alia*, reiterates that "all moneys paid to P-0169 fall within the scope of ordinary and legitimate witness

⁴³ The deadline to respond was shortened in an email from the Chamber on 9 October 2014 at 14.00.

⁴⁴ Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure', 10 October 2014, ICC-01/05-01/08-3160-Conf.

⁴⁵ ICC-01/05-01/08-3160-Conf, paragraphs 2 and 8.

⁴⁶ ICC-01/05-01/08-3160-Conf, paragraph 11.

expenses”.⁴⁷ In particular, the prosecution submits that a payment made to Witness P-169 in September 2011 and described by the defence as “extraordinary”,⁴⁸ “was made on behalf of the Victims and Witnesses Unit”⁴⁹ and appends an email from the VWU to support its contention (“ICC-01/05-01/08-3160-Conf-Exp-AnxB”).⁵⁰

23. In respect of the 11 June 2014 Letter, the prosecution submits that although it was sent to the OSU on 13 June, “it was only discovered by an OSU Officer a few days ago”, as explained in a memorandum drafted by the OSU and appended as Annex A to the Prosecution Response (“Internal Memorandum”).⁵¹ It further contends that the defence is not prejudiced by the late disclosure of the 11 June 2014 Letter since it “is already privy to similar information prior to P-0169’s upcoming testimony, which it can explore along with other letters in its possession that contain the relevant information”.⁵² Concerning the request for disclosure of expenses related to the Relevant Witnesses, the prosecution submits that they are not disclosable under Rule 77. In this regard, the prosecution stresses that (i) the requested information is related to reimbursements of ordinary expenses which do not constitute “payments, benefits or other forms of assistance that go beyond the ordinary requirements of subsistence [which] may affect the credibility of witnesses”;⁵³ and (ii) “[t]he simple fact that P-0169 alleges that he has information that Prosecution witnesses were promised money is not a

⁴⁷ ICC-01/05-01/08-3160-Conf, paragraph 3.

⁴⁸ ICC-01/05-01/08-3159-Conf, paragraphs 15 to 16. The document referred to by the defence is registered under ERN CAR-OTP-0065-0987.

⁴⁹ ICC-01/05-01/08-3160-Conf, paragraph 3.

⁵⁰ ICC-01/05-01/08-3160-Conf-Exp- AnxB.

⁵¹ ICC-01/05-01/08-3160-Conf, paragraph 4.

⁵² ICC-01/05-01/08-3160-Conf, paragraph 8.

⁵³ ICC-01/05-01/08-3160-Conf, paragraph 5. The prosecution quotes this wording from the Chamber’s “Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, ICC-01/05-01/08-2924-Conf, paragraph 19.

sufficient basis for disclosure of regular and legitimate payments made to those witnesses".⁵⁴

24. Concerning the defence's request for an order to the prosecution to conduct a review of its case file and certify before the Chamber that all disclosable material has been provided to the defence, the prosecution refers to a previous ruling by the Chamber and submits that the Chamber should conduct its assessment on a case-by-case basis.⁵⁵

The Defence Reply

25. On 16 October 2014, after having been granted leave to reply pursuant to Regulation 24(5) of the Regulations,⁵⁶ the defence filed its Defence Reply to the "Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'" ("Defence Reply"),⁵⁷ in which it makes additional submissions on five issues arising from the Prosecution Response and reiterates its request that the Chamber grant the remedies sought in the Defence Motion.⁵⁸

⁵⁴ ICC-01/05-01/08-3160-Conf, paragraph 6.

⁵⁵ ICC-01/05-01/08-3160-Conf, paragraph 8. The prosecution refers to paragraph 13 of the "Decision on 'Defence Motion Regarding Prosecution Disclosure'", 3 September 2012, ICC-01/05-01/08-2292: The Chamber therefore is not convinced that ordering the prosecution to conduct a full review of all relevant databases and archives and to provide the defence with any additional disclosable material in its possession, by a certain date, would serve any purpose or address the issue of unavoidable late disclosure. Similarly, the Chamber sees no merit in ordering the prosecution to certify that it has fulfilled its disclosure obligations as regards Article 67(2) items and Rule 77 material, since as previously stressed, such disclosure obligations are ongoing during the defence's presentation of evidence.

⁵⁶ Decision on "Defence Request for Leave to Reply to the 'Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'"", 14 October 2014, ICC-01/05-01/08-3165-Conf.

⁵⁷ Defence Reply to the "Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'", 16 October 2014, ICC-01/05-01/08-3166-Conf.

⁵⁸ ICC-01/05-01/08-3166-Conf, paragraphs 4 to 65.

26. First, the defence avers that the prosecution “has erred in framing its disclosure obligations too narrowly”.⁵⁹ Specifically, the defence challenges the prosecution’s assertion that “[t]he expenses related to the [Relevant Witnesses] do not fall under Rule 77 as they relate to reimbursements of ordinary expenses”.⁶⁰ While conceding that information regarding ordinary expenses is not automatically disclosable, the defence contends that the prosecution has “failed to comply with its duty to consider whether, in light of the particular circumstances of the current litigation, such information *could* be relevant to the witnesses’ state of mind, and apparent belief that their testimony may have been linked to assistance from the Prosecution...”⁶¹ The defence contends that the purpose of Witness P-169’s recall is to hear testimony relating to his references, in the 5 August 2014 Letter, to a “market of deception”⁶² and “subordination”,⁶³ and to “examine the state of mind of the persons, who were allegedly part of this ‘market’ in order to assess whether the voluntariness and veracity of their testimony may have been impacted by extraneous circumstances”.⁶⁴ According to the defence, “it would clearly be instructive for the parties to be in a position to compare the quantity of assistance that might have been provided to the different witnesses.”⁶⁵ It states that the prosecution’s disclosure obligations must be “tailored” to the objective of the upcoming hearing which is “to hear testimony on the impact of any promised assistance”.⁶⁶ The defence submits that since the prosecution is “fully acquainted” with the contents of the communications, “disclosure in advance of the hearing is [...] necessary to

⁵⁹ ICC-01/05-01/08-3166-Conf, paragraphs 4 to 27.

⁶⁰ The defence refers to ICC-01/05-01/08-3160-Conf, paragraph 5.

⁶¹ ICC-01/05-01/08-3166-Conf, paragraph 6 (emphasis in original).

⁶² *[M]arché des dupes* in French original.

⁶³ *Subordination* in French original.

⁶⁴ ICC-01/05-01/08-3166-Conf, paragraphs 8 to 9.

⁶⁵ ICC-01/05-01/08-3166-Conf, paragraph 10.

⁶⁶ ICC-01/05-01/08-3166-Conf, paragraph 15.

ensure that the defence is not disadvantaged *vis-à-vis* the Prosecution in terms of its ability to formulate and present its case in relation to these issues”.⁶⁷ The defence avers that the prosecution should disclose all communication it has had with Witness P-169 and the Relevant Witnesses and that “access to the entire series of exchanges with [Witness P-169 and the Relevant Witnesses] is necessary to understand the rationale for the series of demands, its escalation in terms of the ranges of addressees and the threatened consequences in the event of non-action from the side of the Court [...] and the witnesses’ perception of the nature of their relationship to the Prosecution”.⁶⁸

27. Second, the defence claims that “[a]n internal Prosecution memorandum does not rebut any evidential presumption that an email is received on the date it is sent”.⁶⁹ “As a primary observation”, the defence argues that “the Prosecution’s various assertions as to its communications with Witness P-169 are confusing and difficult to reconcile” and that “failing to discover the earlier email [containing the 11 June 2014 Letter] is inexplicable”.⁷⁰ The defence further submits that the Internal Memorandum is not admissible evidence and that “its annexure to the Prosecution response as means of proof [...] gives rise to a concurrent wider disclosure obligation”.⁷¹ In this regard, the defence submits that “the Trial Chamber is bound to conclude that the Prosecution has been in possession of the [11 June 2014 Letter] since [13 June 2014] and has therefore been in breach of its disclosure obligations throughout the critical period since then”.⁷² “Further and alternatively”, the defence submits that “the Prosecution should now be ordered to disclose to the Defence the contents of the so-called ‘Hotmail

⁶⁷ ICC-01/05-01/08-3166-Conf, paragraph 17.

⁶⁸ ICC-01/05-01/08-3166-Conf, paragraphs 18 to 26.

⁶⁹ ICC-01/05-01/08-3166-Conf, paragraphs 28 to 41.

⁷⁰ ICC-01/05-01/08-3166-Conf, paragraphs 28, 30, and 31.

⁷¹ ICC-01/05-01/08-3166-Conf, paragraph 34.

⁷² ICC-01/05-01/08-3166-Conf, paragraphs 32 to 40.

account', as well as all internal memoranda concerning contact between the prosecution and witnesses via the said account".⁷³

28. Third, with reference to the prosecution's submission that the payment of September 2011 was made "on behalf of the Victims and Witnesses Unit", the defence submits that absent any indication that the witness was informed that the money was coming from the VWU and not the prosecution,⁷⁴ this payment impacts on the credibility of the witness who might have "believed his testimony to be linked to assistance from the Prosecution".⁷⁵ Accordingly, the defence argues that "the fact that the Prosecution has paid P-169 substantial amounts of money, whether on behalf of the VWU or otherwise, provides further support for the Defence contention that the Chamber must now disregard his testimony".⁷⁶

29. Fourth, the defence infers from the prosecution's assertion that "all moneys paid to P-0169 fall within the scope of ordinary and legitimate witness expenses",⁷⁷ that "the Prosecution was acting as an 'intermediary' and dispensing large payments of money for subsistence of Prosecution witnesses on behalf of the VWU [and] feels under no obligation to disclose these payments to the Defence".⁷⁸ Consequently, considering the "potential impact on the credibility of witnesses who were receiving payments from the Prosecution (albeit on behalf of the VWU)",⁷⁹ the defence "requests that the Prosecution be ordered to disclose all

⁷³ ICC-01/05-01/08-3166-Conf, paragraph 41.

⁷⁴ ICC-01/05-01/08-3166-Conf, paragraphs 44 and 48.

⁷⁵ ICC-01/05-01/08-3166-Conf, paragraph 47.

⁷⁶ ICC-01/05-01/08-3166-Conf, paragraph 50.

⁷⁷ The defence refers to ICC-01/05-01/08-3160-Conf, paragraph 3.

⁷⁸ ICC-01/05-01/08-3166-Conf, paragraph 52.

⁷⁹ ICC-01/05-01/08-3166-Conf, paragraph 53.

payments made to prosecution witnesses 'on behalf of the [VWU]', such payments clearly falling within the scope of Rule 77".⁸⁰

30. Finally, the defence asserts that "[t]he Prosecution's refusal to disclose communication with its witnesses has given rise to an inequality of arms which undermines the fairness of the present proceedings".⁸¹ In this respect, the defence avers that the fact that Witness P-169 denied having received any compensation undermines his credibility.⁸² It further points out that the prosecution questioned defence witnesses on benefits received in exchange for their testimony and received information thereon through "procedural powers" that are not available to the defence.⁸³ According to the defence, "the Prosecution has exercised these powers for the sole purpose of collecting incriminating information rather than disclosing the exact same categories of information that might be exculpatory or at the very least, relevant to the Defence".⁸⁴ The defence submits that the Chamber must intervene to redress this imbalance.⁸⁵

II. Analysis and conclusions

31. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber has considered Articles 64(2), 67 and 68 of the Statute and Rules 77 and 81 of the Rules.

32. At the outset, the Chamber notes that in its reply, the defence requests that the Chamber either conclude that the prosecution has been in possession of the 11

⁸⁰ ICC-01/05-01/08-3166-Conf, paragraph 54.

⁸¹ ICC-01/05-01/08-3166-Conf, paragraphs 55 to 64.

⁸² ICC-01/05-01/08-3166-Conf, paragraphs 55 and 56.

⁸³ ICC-01/05-01/08-3166-Conf, paragraphs 57 to 64.

⁸⁴ ICC-01/05-01/08-3166-Conf, paragraph 64.

⁸⁵ ICC-01/05-01/08-3166-Conf, paragraph 64.

June 2014 Letter since 13 June 2014, or alternatively order the disclosure of the content of the "Hotmail" account and all internal memoranda concerning contact between the prosecution and witnesses via this account, a request raised for the first time in the Defence Reply and not mentioned in the disposition thereof.⁸⁶ This notwithstanding, the Chamber deals with the prosecution's explanation for the late disclosure of the 11 June 2014 Letter in paragraph 48 below.

33. The Chamber will examine the relevant requests in accordance with its previous decisions on the prosecution's disclosure obligations.⁸⁷ As to the application of Rule 77 of the Rules, the Chamber reiterates the Appeals Chamber's position that information "material to the preparation of the defence" needs to be interpreted broadly so as to include documents that were not directly linked to exonerating or incriminating evidence,⁸⁸ and that any assessment in this respect "will depend upon the specific circumstances of the case"⁸⁹ and "should [...] be made on a *prima facie* basis".⁹⁰ In addition, the Chamber recalls that information pertaining to payments, benefits or other forms of assistance *that go beyond the ordinary requirements of subsistence* may affect the credibility of witnesses and information

⁸⁶ See in particular, ICC-01/05-01/08-3166-Conf, paragraph 41.

⁸⁷ See, *inter alia*, ICC-01/05-01/08-3154-Conf, paragraph 46; Decision on the "Defence Motion on Prosecution contact with its witnesses", 22 May 2014, ICC-01/05-01/08-3070, paragraphs 19 to 27; Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 12 July 2011, ICC-01/05-01/08-1594-Red; 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 Request for disclosure of pre-interview assessments and the consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-Conf, paragraphs 30 and 37.

⁸⁸ 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, paragraphs 77 to 78; ICC-01/04-01/06-1433, paragraph 77; 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.

⁸⁹ ICC-02/05-03/09-501, paragraph 39.

⁹⁰ ICC-02/05-03/09-501, paragraph 42. The ICTY has interpreted the phrase "material to the preparation of the defence" as referring to material that is "significantly helpful to an understanding of important inculpatory or exculpatory evidence; it is material if there is a strong indication that [...] it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal": ICTY, *Prosecutor v. Delalić et al*, Case No. IT-96-21, Decision on the motion by the accused Zejnil Delalić for the disclosure of evidence, 26 September 1996. See ICC-01/05-01/08-2845-Conf, paragraph 9.

related thereto may thus be material to the preparation of the defence and disclosable pursuant to Rule 77 of the Rules.⁹¹

(i) *First Request: disclosure of the Covering Email*

34. On 10 October 2014, subsequent to the filing of the Defence Motion, the prosecution disclosed the Covering Email under Article 67(2) of the Statute.⁹² Accordingly, the defence's request for disclosure has become moot. However, the Chamber notes that the disclosed Covering Email contains redactions to the email address of one addressee of the email sent by Witness P-169 and the email address of the sender who transferred Witness P-169's email to the prosecution. These redactions are not limited to the user name, but also cover the domain name and extension.⁹³

35. Chambers of the Court have consistently emphasised the overriding presumption that disclosable material must be served in full and that redactions must be justified and authorised individually under the provisions of the

⁹¹ Decision on the "Defence request for modification of redactions", 21 October 2011, ICC-01/05-01-08-1857-Conf, paragraphs 10 to 12. The Chamber referred to *The Prosecutor v Thomas Lubanga Dyilo*, Transcript of hearing on 25 May 2010, ICC-01/04-01/06-T-294-ENG CT WT, page 28, lines 1 to 10; ICTR, *Prosecutor v. Karemera et al., Case No. ICTR-98-44-T*, Trial Chamber III, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paragraph 16. *See also* ICTR, *Prosecution v. Karemera et al., Case No. ICTR-98-44-T*, Trial Chamber III, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, paragraph 7; ICTR, *Prosecutor v. Karemera et al., Case No. ICTR-98-44-T*, Trial Chamber III, Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments made for the Benefit of Witness G, 29 May 2008, paragraph 8. The concept under Article 67(2) of information that "may affect the credibility of prosecution evidence" has been addressed by other Chambers of this Court, notably by Trial Chamber I which held that a request which "could be interpreted properly as expressing a somewhat unusual financial interest in giving evidence before this Court [...] was always disclosable material to the Defence": ICC-01/04-01/06-T-294-ENG CT WT, page 28, lines 1 to 10. This ruling is further in line with the practice of other international criminal tribunals, where it was held that information concerning benefits paid and promises made to witnesses that go beyond the ordinary requirements are to be disclosed to the defence on the basis that such benefits or promises potentially affect the witnesses' credibility (emphasis added).

⁹² Prosecution's Communication of Evidence disclosed to the Defence on 10 October 2014 pursuant to Article 67(2) of the Rome Statute, 10 October 2014, ICC-01/05-01/08-3163 and confidential Annex A.

⁹³ *See in this respect* ICC-01/05-01/08-3166-Conf, paragraph 36.

Statute.⁹⁴ Regarding the redactions to the Covering Email, the Chamber finds that the redacted information is relevant to understanding the transmission chain of the email transmitting the 11 June 2014 Letter. The Chamber therefore orders the prosecution to disclose an unredacted version of the Covering Email. Should the prosecution consider that some of the redactions need to be maintained, it shall (i) disclose a lesser redacted version of the Covering Email, with redactions limited to the user name; and (ii) inform the Chamber, in a filing, as to why the remaining redactions are justified under Rule 81 of the Rules.

- (ii) *Second Request: disclosure of "all email and other written exchanges with P-169, and any other video or audio recordings, minutes and/or notes of the Prosecution's conversations with P-169, whether in the presence of VWU or otherwise"*

36. In line with its approach to disclosure recalled in paragraph 33 above, the Chamber has repeatedly ordered the prosecution to disclose letters sent by Witness P-169.⁹⁵ It further considered it necessary for the defence to receive a comprehensive picture of Witnesses P-169 and P-178's interaction with the Court and any assistance requested by or provided to the witnesses.⁹⁶ Lastly, in Decision 3154, the Chamber decided to recall Witness P-169 to hear his testimony

⁹⁴ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, ICC-01/04-01/06-568, paragraphs 36 and 39; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008, ICC-01/04-01/07-475, paragraph 70; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008, ICC-01/04-01/07-476, paragraph 64.

⁹⁵ See for example ICC-01/05-01/08-2845-Conf-Red and ICC-01/05-01/08-2924-Conf.

⁹⁶ Transcript of hearing of 26 November 2013, ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 22, lines 5 to 18, page 23, line 18 to page 24, line 14, page 27, lines 11 to 14; ICC-01/05-01/08-2924-Conf, paragraph 28.

in relation to issues arising out of his various allegations and witness credibility.⁹⁷

37. On 8 October 2014, further to an email request from the defence, the prosecution disclosed a number of documents containing correspondence between the prosecution and Witness P-169. However, as stressed by the defence, the disclosed documents and prosecution filings suggest the possibility that the prosecution has had further exchanges with Witness P-169 in relation to which no information has been disclosed to the defence.⁹⁸

38. The Chamber finds that the information requested by the defence in the Second Request may be material to the defence's preparation for Witness P-169's testimony. In particular, disclosure of such information may better allow the defence to assess the various letters in the context of Witness P-169's wider interaction with the Court and to prepare its questioning accordingly. The Chamber therefore orders the prosecution to disclose any and all previously undisclosed email or other written communication and any video or audio recordings of communication between the prosecution and Witness P-169, to the extent that such material relates to payments or is otherwise relevant to the allegations contained in Witness P-169's letters.

39. Regarding any "screening notes", the Chamber recalls that, in principle, such notes fall within the scope of Rule 81(1) of the Rules and are not disclosable.⁹⁹ This notwithstanding, the prosecution shall disclose any relevant information

⁹⁷ ICC-01/05-01/08-3154-Conf, paragraph 50 (i) and (ii)

⁹⁸ See ICC-01/05-01/08-3166-Conf, paragraphs 20 to 22.

⁹⁹ See ICC-01/05-01/08-3070, paragraphs 19 to 27.

that falls under Article 67(2) or Rule 77, either redacting the original document or extracting the relevant information, as appropriate.¹⁰⁰

(iii) *Third Request: disclosure of "all email and other written exchanges with any of the 21 witnesses listed in the annex to the Letter of 5 August, and any other video or audio recordings, minutes and/or notes of the Prosecution's conversations with these witnesses, whether in the presence of VWU or otherwise"*

40. As a preliminary matter and regarding the defence's contention that "[i]n line with the practice of the Court, the Prosecution was aware that post-testimonial contact was required to be audio or video-recorded", the Chamber underlines that the Protocol on Witnesses Familiarisation does not contain any such requirement.¹⁰¹ The Chamber also notes that, in addition to originating from a different Chamber of the Court, the decision referred to by the defence in support of its contention deals with a different scenario from that under consideration, in so far as the purpose of the meetings in that decision was for the prosecution to conduct additional interviews with witnesses it had previously called, and who had already testified, to ask them questions relating to evidence to be given by upcoming defence witnesses.¹⁰²

41. Turning to the merits of the Third Request, the Chamber notes that it previously found that in view of the prosecution's statement that the Relevant Witnesses it was able to contact had declined any invitations to meetings allegedly convened by Witness P-178, there was "no suggestion that the prosecution is in possession

¹⁰⁰ See ICC-01/05-01/08-3070, paragraphs 19 to 27.

¹⁰¹ See Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 8 December 2000, ICC-01/05-01/08-1081-Anx. See in particular paragraphs 107 to 116 dealing with the period after the completion of a witness's testimony.

¹⁰² *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC 01/04-01/06-2192-Red, paragraphs 39 to 41 and 66.

of any additional related material that would have the potential to affect the credibility of the [Relevant Witnesses] or be material to the preparation of the defence".¹⁰³ However, in Decision 3154, the Chamber noted that contrary to previous letters, the 5 August 2014 Letter includes allegations relating to "money transferred by the ICC prosecution for the benefit of witnesses"¹⁰⁴ and "subordination" and "ill-treatment" of the Relevant Witnesses.¹⁰⁵ As a result, the Chamber decided to recall Witness P-169.

42. In view of the additional allegations outlined above, the Chamber is of the view that the information requested by the defence in the Third Request may be material to the defence's preparation for Witness P-169's testimony. The Chamber therefore orders the prosecution to disclose any and all emails or other written communication and any video or audio recordings of communication between the prosecution and any of the Relevant Witnesses, to the extent that such material relates to payments or is otherwise relevant to the allegations contained in Witness 169's letters.

43. Regarding any "screening notes", the Chamber again recalls that, in principle, such notes fall within the scope of Rule 81(1) of the Rules and are not disclosable.¹⁰⁶ This notwithstanding, the prosecution shall disclose any relevant information that falls under Article 67(2) or Rule 77, either redacting the original document or extracting the relevant information, as appropriate.¹⁰⁷

¹⁰³ ICC-01/05-01/08-2924-Conf, paragraph 30.

¹⁰⁴ ICC-01/05-01/08-3138-Conf-AnxA. Specifically, the letter states "[l]'argent versé par le procureur près la CPI au bénéfice des témoins."

¹⁰⁵ ICC-01/05-01/08-3154-Conf, paragraph 28. Referring to ICC-01/05-01/08-3138-Conf-AnxA. Specifically, the letter states, "Ils sont prêts à porter la preuve de subordination des témoins et tous les mauvais comportements subis de la part de VWU, voire la liste de leurs noms en annexe."

¹⁰⁶ See ICC-01/05-01/08-3070, paragraphs 19 to 27.

¹⁰⁷ See ICC-01/05-01/08-3070, paragraphs 19 to 27.

(iv) *Fourth Request: disclosure of all payments and other forms of assistance given by the Prosecution to P-169 and the Relevant Witnesses, as well as all correspondence and documentation concerning these payments*

44. As recalled in paragraph 33 above, information pertaining to payments, benefits or other forms of assistance *that go beyond the ordinary requirements of subsistence* may affect the credibility of witnesses and information related thereto may be material to the preparation of the defence and therefore disclosable to the defence.¹⁰⁸

45. However, in the present case the defence seeks disclosure of information relating to payments, at least some of which will not go beyond ordinary expenses. In this regard, the Chamber notes that Witness P-169 will be questioned in relation to his allegations that the prosecution paid money to witnesses. In the present circumstances, the Chamber considers that details on all payments made by the prosecution to the Relevant Witnesses may be material to the defence's preparation and are therefore disclosable, including payments made by the prosecution to witnesses "on behalf of" the VWU.

¹⁰⁸ *The Prosecutor v Thomas Lubanga Dyilo*, Transcript of hearing on 25 May 2010, ICC-01/04-01/06-T-294-ENG CT WT, page 28, lines 1 to 10; ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paragraph 16. *See also* ICTR, *Prosecution v. Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, paragraph 7; ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III, Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments made for the Benefit of Witness G, 29 May 2008, paragraph 8. The concept under Article 67(2) of information that "may affect the credibility of prosecution evidence" has been addressed by other Chambers of this Court, notably by Trial Chamber I which held that a request which "could be interpreted properly as expressing a somewhat unusual financial interest in giving evidence before this Court [...] was always disclosable material to the Defence": ICC-01/04-01/06-T-294-ENG CT WT, page 28, lines 1 to 10. This ruling is further in line with the practice of other international criminal tribunals, where it was held that information concerning benefits paid and promises made to witnesses that go beyond the ordinary requirements are to be disclosed to the defence on the basis that such benefits or promises potentially affect the witnesses' credibility (emphasis added).

46. The Chamber notes that on 20 October 2014, the prosecution reported that it had “conducted a further final cross-check of its databases to ensure that the Defence is in possession of the relevant witness material prior to the hearing”.¹⁰⁹ In this context, the prosecution disclosed additional payments of ordinary expenses. The Chamber orders the prosecution to disclose all previously undisclosed payments and other forms of assistance given by the prosecution to Witness P-169 and the Relevant Witnesses, as well as all correspondence and documentation concerning these payments.

47. The Chamber further notes that the email supporting the prosecution’s submission that the payment to Witness P-169 was made “on behalf of the [VWU]” (document ICC-01/05-01/08-3160-Conf-Exp-AnxB) is currently classified as *ex parte* – Registry and prosecution only. As this information may be relevant to the defence, the Chamber orders the prosecution to file a confidential redacted version of document ICC-01/05-01/08-3160-Conf-Exp-AnxB or to inform the Chamber that it can be reclassified as confidential without redactions.

(v) *Fifth and Seventh Request: request that the Chamber reprimand the prosecution for its failure to comply with its disclosure obligations in the present case and order the prosecution to conduct a review of its case file and certify before the Chamber that all disclosable material has been provided to the defence*

48. The Chamber has previously expressed its regret in relation to the prosecution’s failure to meet its disclosure obligations in a timely manner.¹¹⁰ In this respect, the Chamber is dissatisfied with the prosecution’s explanation for the delay in its disclosure of the 11 June 2014 Letter and agrees with the defence’s submission

¹⁰⁹ Email from the prosecution to the defence and legal representative on 20 October 2014 at 16.14.

¹¹⁰ Decision on “Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, ICC-01/05-01/08-2924-Conf, paragraph 15.

that the creation of a special email account entails a duty to monitor this account with the requisite diligence for as long as it is active.¹¹¹ In this regard, the Chamber considers that the fact that the email was sent to the OSU cannot be considered as an excuse for the delay.

49. Notwithstanding the above, the Chamber is of the view that, in the present circumstances, the defence did not suffer any concrete prejudice from the delayed disclosure. In particular, considering that the defence received the relevant material prior to the testimony of Witness P-169, the Chamber finds that the defence is not prejudiced in its preparation for the witness's testimony. The Chamber further stresses that it granted the parties and the legal representative an opportunity to make additional submissions to their closing briefs and to submit additional material into evidence.¹¹² In light of the above, the Chamber is of the view that reprimanding the prosecution for the alleged failure to comply with its disclosure obligations is not warranted.

50. Concerning the defence request that the Chamber order the prosecution to review its case file and certify before the Chamber that all disclosable material has been provided to the defence, the Chamber notes that the material to be disclosed by virtue of the present Decision includes (i) a lesser or unredacted version of the Covering Email; (ii) any and all email and other written communication and any video or audio recordings of communication between the prosecution and Witness P-169 or any of the Relevant Witnesses, as well as any other material, to the extent that it relates to payments or is otherwise relevant to the allegations contained in Witness P-169's letters; (iii) all payments and other forms of assistance given by the Prosecution to Witness P-169 and the

¹¹¹ ICC-01/05-01/08-3159-Conf.

¹¹² ICC-01/05-01/08-3154-Conf, paragraph 50 (xvi).

21 witnesses listed in the annex of the Letter of 5 August 2014, as well as any and all correspondence and documentation concerning these payments; and (v) the email sent by the VWU to the prosecution in relation to the “payments made on behalf of the VWU”. In view of these directions, the Chamber is of the view that an additional order as requested by the defence is not necessary. The Chamber therefore rejects the Fifth and Seventh Requests.

51. That notwithstanding, the Chamber emphasises once more that should the prosecution be or come to be in the possession of material similar to the material covered by the present Decision and disclosable under Article 67(2) of the Statute or Rule 77 of the Rules, the prosecution is of course obligated to disclose such materials without delay.¹¹³

(vi) *Sixth Request: request that the Chamber not rely on the testimony of P-169 for any incriminating findings of fact against Mr Bemba*

52. In relation to the request that the Chamber not rely on the testimony of P-169 for any incriminating findings of fact against Mr Bemba, the Chamber recalls that in Decision 3154 it deferred its decision on whether or not to rely on the testimony of Witness P-169 or the Relevant Witnesses.¹¹⁴ The Chamber simply repeats this position.

¹¹³ See Decision on defence requests for disclosure, 2 July 2014, ICC-01/05-01/08-3100, paragraph 42; Decision on “Defence Urgent Request for Disclosure and Injunctive Relief concerning Privileged Defence Communications” and Addendum, 3 July 2014, ICC-01/05-01/08-3101, paragraph 32.

¹¹⁴ ICC-01/05-01/08-3154-Conf, paragraph 38 and 50(vi).

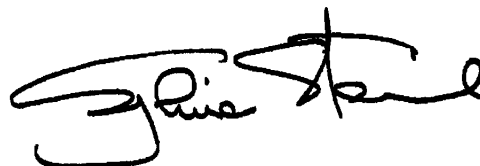
53. In view of the above, the Chamber hereby¹¹⁵

- (i) DECLARES the First Request moot;
- (ii) ORDERS the prosecution to disclose either an unredacted version of the Covering Email or a lesser redacted version together with a filing explaining why the remaining redactions are justified;
- (iii) PARTIALLY GRANTS the Second, Third and Fourth Requests, to the extent that the material requested relates to payments or is otherwise relevant to the allegations contained in Witness P-169's letters and thereby falls under Article 67(2) or Rule 77. Accordingly, the Chamber:
 - a. ORDERS the prosecution to disclose any and all previously undisclosed email or other written communication and any video or audio recordings of communication between the prosecution and Witness P-169, as well as any other material, to the extent that such material relates to payments or is otherwise relevant to the allegations contained in Witness P-169's letters;
 - b. ORDERS the prosecution to disclose any and all email or other written communication and any video or audio recordings of communication between the prosecution and any of the Relevant Witnesses, as well as any other material, to the extent that such material relates to payments or is otherwise relevant to the allegations contained in Witness P-169's letters; and

¹¹⁵ Due to the upcoming testimony of Witness P-169 and in order to enable the participants to prepare, the orders listed below were communicated via email prior to the issuance of the present Decision. *See* email sent by the Chamber to the participants on 21 October 2014 at 13.46.

- c. ORDERS the prosecution to disclose all payments and other forms of assistance given by the Prosecution to Witness P-169 and the 21 witnesses listed in the annex of the Letter of 5 August 2014, as well as any and all correspondence and documentation concerning these payments.
- (iv) ORDERS the prosecution to file a confidential redacted version of document ICC-01/05-01/08-3160-AnxB-Conf-Exp or to inform the Chamber that it can be reclassified as confidential without redactions;
- (v) REJECTS the Fifth and Seventh Requests;
- (vi) DEFERS its decision on the Sixth Request;
- (vii) DECLARES the Eighth, Ninth and Alternate Ninth Requests moot; and
- (viii) ORDERS the prosecution to comply with the deadline of 10.00 on Wednesday, 22 October 2014, set in the email sent by the Chamber on 21 October 2014 at 13.46.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 21 October 2014

At The Hague, the Netherlands