

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 December 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

**Public redacted version of "Decision on 'Defence Motion concerning
'Information on contacts [of] Witnesses 169 and 178 with other
witnesses'"**

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

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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 Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’” (“Decision”).¹

I. Background and Submissions

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 [...]” together with confidential *ex parte* Annexes A and B (“Prosecution Submission”).² The prosecution informed the Chamber that the Registrar’s denial of Witness CAR-OTP-PPPP-0169 (“Witness 169”) and Witness CAR-OTP-PPPP-0178’s (“Witness 178”) loss of income claims caused frustration and complaints from both witnesses.³ As a result, Witness 169 sent communications to, among others, the prosecution and the VWU,⁴ in which he, *inter alia*, (i) listed alleged outstanding claims, including loss of income and “money promised by the Prosecutor for witnesses”; (ii) provided a list [REDACTED] of 22 individuals, including 21 witnesses called by the prosecution (“Individuals”);⁵ and (iii) alleged that many of the Individuals had been contacted and gathered by Witness 178 to “look at loss of income

¹ The Chamber notes that the present Decision is classified as confidential. To the extent that this Decision makes reference to the existence of, or, to a limited extent, the content of documents filed or communications exchanged on an *ex parte* basis, the Chamber considers that the information concerned does not warrant *ex parte* treatment at this time.

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.

³ ICC-01/05-01/08-2827-Conf-Exp, paragraph 6.

⁴ The communications are appended in Annexes A and B to the Prosecution Submission and appear addressed to several Court officials and [REDACTED]. Annex A includes the letter sent by Witness 169 to the prosecution and an email sent by Witness 169 on 7 June 2013. Annex B includes the letter sent by Witness 169 to the prosecution, a letter sent by Witness 169 to the VWU as well as an email sent by Witness 169 on 10 June 2013. One of the addressees of the letters is the Presiding Judge of the *Bemba* case, who has never received this letter before.

⁵ ICC-01/05-01/08-2827-Conf-Exp, paragraphs 7 and 10. As stressed by the VWU, [REDACTED].

claims and other [issues]”.⁶ On the basis of this information, the prosecution sought the Chamber’s guidance as to the possible need, appropriateness, and legal basis of any disclosure requirements resulting from the information contained in the Prosecution Submission.⁷

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 [...]' ("25 October Decision").⁸ In its decision, the Chamber, *inter alia*, (i) determined that any information relating to the allegations made by Witness 169 as to “outstanding claims” and “money promised by the Prosecutor for witnesses” may be material for the preparation of the defence and should therefore be disclosed under Rule 77 of the Rules;⁹ (ii) ordered the prosecution to prepare, in coordination with the VWU and subject to the Chamber’s approval, a proposed redacted version of the Prosecution Submission, with redactions to be applied only to (a) the current and past places of residence of the Individuals and their respective current and past contact details; and (b) the identities and location of the Court’s field staff.¹⁰

3. On 1 November 2013, by way of an email,¹¹ the prosecution provided the Chamber with its proposals for redactions to the Prosecution Submission. In its email, the prosecution specified that “the proposals go beyond the scope delineated by the Chamber’s decision” and contain “additional proposals relat[ing] to information pertaining to aspects of VWU’s management of issues relating to protection and safety and wellbeing of

⁶ ICC-01/05-01/08-2827-Conf-Exp, paragraph 9.

⁷ ICC-01/05-01/08-2827-Conf-Exp, paragraph 20.

⁸ Decision on the prosecution's 'Information on [REDACTED] Witnesses 169 and 178 [REDACTED] [...]' (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 [REDACTED] of Witnesses 169 and 178 [REDACTED]' (ICC-01/05-01/08-2827-Conf-Exp)" of 25 October 2013, 5 November 2013, ICC-01/05-01/08-2845-Conf-Red.

⁹ ICC-01/05-01/08-2845-Conf-Red, paragraph 10.

¹⁰ ICC-01/05-01/08-2845-Conf-Red, paragraphs 11, 12 and 13(ii).

¹¹ Email from the prosecution to the Chamber of 1 November 2013 at 18.18.

witnesses” and submitted that “these extended proposed redactions are necessary to protect the ability of VWU to best manage the protection program and perform its duties”.

4. By email of 5 November 2013, the Chamber approved the prosecution’s proposals, subject to a number of amendments.¹² In particular, the Chamber instructed the prosecution (i) to consult with the VWU as to whether specific categories of redactions may be lifted “without compromising the security of the witness or the VWU’s ability to best manage the protection programme and perform its duties”; and (ii) to file, after implementation of the Chamber’s instructions in coordination with the VWU, a consolidated redacted version of the Prosecution Submission. In an email exchange between the prosecution and the VWU, on which the Chamber was copied, the prosecution explained that it proposed “a further set of redaction to all references to support provided by the VWU”, including “allowances paid [to Witness 169], [REDACTED].”¹³ The VWU replied that “the proposed redactions by the OTP in relation to the financial details and other information that could lead to identifying the working practices and security measures that the VWU employ to protect witnesses [...] should remain confidential and should not be further disclosed to the Defence.”¹⁴ Further to the VWU’s response, the prosecution filed a confidential redacted version of the Prosecution Submission, including its annexes, on 7 November 2013.¹⁵

5. On 11 November 2013, the defence filed its “Defence Motion concerning ‘Information on contacts with witnesses 169 and 178 with other witnesses’”

¹² Email from the Chamber to the prosecution of 5 November 2013 at 12.53.

¹³ Email from the prosecution to the VWU on 5 November 2013 at 14.46.

¹⁴ Email from the VWU to the prosecution, copying the Chamber, on 6 November 2013 at 17.46.

¹⁵ Confidential redacted version of Information on [REDACTED] Witnesses 169 and 178 [REDACTED], 7 November 2013, ICC-01/05-01/08-2827-Conf-Red.

(“Defence Motion”).¹⁶ The defence requests that the Chamber order: (i) the provision of public redacted versions of all filings associated with the conduct of Witnesses 169 and 178; (ii) the prosecution to provide the defence with a lesser redacted version of the Prosecution Submission and to formally disclose and attribute an Evidence Reference Number (“ERN”) to Annexes A and B; (iii) “the disclosure of any requests for payments or other benefits made by Witness 169, Witness 178, or any of the 22 Individuals and all details and dates of the payments or benefits provided by the prosecution, the VWU, or the Registry to Witnesses 169 and 178, or any of the 22 Individuals, including those made in the period between 25 June 2013 and 3 October 2013”; (iv) “the disclosure of any recordings, statements or notes of interviews generated by the Prosecution during the contact with both Witness 169 and Witness 178, as well as Witness 119, Witness 42, Witness 38, Witness 68 and any of the other Individuals, as well as [REDACTED] or any other intermediary with whom it has been in contact”; and (v) the recall of Witness 169 and Witness 178.¹⁷

6. On 15 November 2013, pursuant to the Chamber’s instruction,¹⁸ the prosecution and one legal representative of victims, Maître Assingambi Zarambaud, filed their observations on the Defence Motion.¹⁹

7. The prosecution requests that the Chamber reject the Defence Motion in its entirety.²⁰ In relation to the defence’s request for the provision of public redacted versions of all filings associated with the conduct of Witnesses 169

¹⁶ Defence Motion concerning “Information on [REDACTED] witnesses 169 and 178 [REDACTED]”, 11 November 2013, ICC-01/05-01/08-2872-Conf.

¹⁷ ICC-01/05-01/08-2872-Conf, paragraph 50.

¹⁸ Email from the Chamber to the parties, participants and the Registry on 12 November 2013 at 10.19.

¹⁹ Prosecution’s Response to Defence Motion concerning “Information [REDACTED] Witnesses 169 and 178 [REDACTED]”, 15 November 2013, ICC-01/05-01/08-2897-Conf; Réponse du Représentant légal de victimes, Me. Zarambaud Assingambi, à la « Defence Motion concerning “Information on [REDACTED] Witnesses 169 and 178 [REDACTED]” », ICC - 01/05 - 01/08 - 2872 - Conf, 15 November 2013, ICC-01/05-01/08-2894-Conf.

²⁰ ICC-01/05-01/08-2897-Conf, paragraph 21.

and 178, the prosecution submits that given that the prosecution complied with the Chamber's order to file a confidential redacted version of the Prosecution Submission, any request for the provision of other filings is premature and unnecessary.²¹ Concerning the defence's request for a lesser redacted version of the Prosecution Submission, the prosecution asserts that the redactions applied to the Prosecution Submission comply with the guidelines given by the Chamber. In this regard, the prosecution stresses that redactions also cover financial details and other information that could lead to identifying the working practices and security measures that the VWU employ to protect witnesses and are therefore necessary to protect the ability of the VWU, as well as the prosecution, to best manage the protection programme and perform their duties *vis-à-vis* witnesses.²²

8. The prosecution further submits that the defence's requests for disclosure of information regarding benefits and payments to prosecution witnesses and of materials generated from contacts with Witnesses 169 and 178 and the Individuals are without merit. In this regard, the prosecution submits that it complied with the Chamber's directions by providing the defence with a redacted version of its submissions and that any reimbursement by the prosecution of expenses that do not go beyond the ordinary requirements of subsistence does not have the potential to affect witnesses' credibility and, as such, is not subject to disclosure. According to the prosecution, any request for benefits and/or payments going beyond the reimbursement of ordinary expenses and any related contact between prosecution witnesses and the Court are being dealt with by the VWU, which is why any request for disclosure of such information should be addressed to the VWU and not to the prosecution.²³

²¹ ICC-01/05-01/08-2897-Conf, paragraph 12.

²² ICC-01/05-01/08-2897-Conf, paragraphs 10 to 11.

²³ ICC-01/05-01/08-2897-Conf, paragraphs 13 to 17.

9. Finally, the prosecution submits that the defence's request to further investigate the contacts and potential collusion between prosecution witnesses, including recalling Witnesses 169 and 178, is excessive and unnecessary for three reasons: first, the issue at stake is limited to the allegations made by Witness 169; secondly, the defence already had the opportunity to explore Witnesses 169 and 178's credibility during their testimony; and thirdly, Witness 169's allegations refer to a timeframe long after the completion of his and the other witnesses' testimonies.²⁴

10. Maître Zarambaud requests that the Chamber reject the defence request for provision of public redacted versions of the documents related to the conduct of Witnesses 169 and 178, or, in the alternative, that he be consulted on the redactions to be applied to the relevant filings.²⁵ For that purpose, he stresses that some of the individuals mentioned in the Prosecution Submission have [REDACTED] and are therefore represented by him.²⁶ In this capacity, Maître Zarambaud submits that in the absence of any report by the prosecution or the VWU that would prove the veracity of the allegations, any publication of these documents would be prejudicial and premature at this stage and would risk compromising the security and the physical and psychological well-being of the victims he represents.²⁷

11. On 19 November 2013, upon the Chamber's instruction,²⁸ the VWU filed its "VWU's Observations in relation to the Defence Motion ICC-01/05-01/08-2827-Conf".²⁹ The VWU submits that, as a matter of principle, it does not share with the parties and participants the details of the [REDACTED]. The main reason for this practice is [REDACTED], which is particularly important

²⁴ ICC-01/05-01/08-2897-Conf, paragraphs 18 to 20.

²⁵ ICC-01/05-01/08-2894-Conf, page 8.

²⁶ ICC-01/05-01/08-2894-Conf, paragraphs 5 and 9.

²⁷ ICC-01/05-01/08-2894-Conf, paragraphs 12 to 16.

²⁸ Email from the Chamber to the parties, participants and the Registry on 12 November 2013 at 10.19.

²⁹ VWU's Observations in relation to the Defence Motion ICC-01/05-01/08-2872-Conf, 19 November 2013, ICC-01/05-01/08-2903-Conf.

for [REDACTED].³⁰ Secondly, the disclosure of financial details can also lead to identification of the working practices employed by the VWU and undermine the security measures implemented for the witnesses' benefit.³¹ Accordingly, the VWU submits that the information regarding the financial details provided in the Prosecution Submission should be redacted before being disclosed to the defence.³²

12. On 26 November 2013, the Chamber held a confidential *ex parte*, Registry only, status conference to address issues related to the VWU's observations.³³ During the status conference, the Chamber instructed the VWU to provide (i) a table enclosing updated information in relation to financial benefits allocated to the 22 Individuals;³⁴ (ii) a report containing the history of the situation of Witnesses 169 and 178;³⁵ and (iii) a summary of this report containing information that can be shared with the parties.³⁶

13. On 29 November 2013, the VWU filed its confidential *ex parte*, VWU only, "Victims and Witnesses Unit's Report in relation to the Defence Motion ICC-01/05-01/08-2872-Conf pursuant to the Status Conference held on 26 November 2013" together with three confidential *ex parte*, VWU only, Annexes A, B, and C.³⁷ On 6 December 2013, further to the Chamber's instruction,³⁸ the VWU filed an addendum to Annex C, including information provided in Annex B and which the Chamber considered to be potentially

³⁰ ICC-01/05-01/08-2903-Conf, paragraph 3.

³¹ ICC-01/05-01/08-2903-Conf, paragraph 3.

³² ICC-01/05-01/08-2903-Conf, paragraph 5.

³³ Order convening a confidential *ex parte*, Registry only, status conference, 21 November 2013, ICC-01/05-01/08-2904; transcript of hearing of 26 November 2013, ICC-01/05-01/08-T-358-CONF-EXP-ENG ET.

³⁴ ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 23, line 18 to page 24, line 14.

³⁵ ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 22, lines 5 to 18

³⁶ ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 27, lines 11 to 14.

³⁷ ICC-01/05-01/08-2912-Conf-Exp and confidential *ex parte* Annexes A, B and C. Annexes A, B and C respectively provide the information requested by the Chamber during the status conference as set out in paragraph 12(i), (ii) and (iii) above.

³⁸ Email from the Chamber to the VWU on 3 December 2013 at 15.53.

“material to the preparation of the defence”.³⁹

II. Analysis and conclusions

14. For the purpose of the present Decision and in accordance with Article 21 of the Rome Statute (“Statute”), the Chamber has considered Articles 64(2), (6)(c) and (e), (7) and 9(a), 67 and 68 of the Statute, Rules 16 to 18, 77, 81 and 82 of the Rules of Procedure and Evidence (“Rules”) and Regulations 20, 23*bis* and 35(2) of the Regulations of the Court (“Regulations”).

15. At the outset, and before considering the merits of the Defence Motion, the Chamber regrets that, after having received the specific communications from Witness 169, the prosecution waited for over four months before seeking the Chamber’s guidance in relation to any disclosure requirements resulting from that material. In view of this delay, the Chamber reiterates its instruction that “as an on-going obligation during the trial proceedings, [the prosecution] shall disclose any Article 67(2) items or permit the defence to inspect any Rule 77 material in its possession or control, *promptly upon their identification*, throughout the presentation of evidence by the defence.”⁴⁰

1. Reclassification as public of all filings associated with the conduct of Witnesses 169 and 178 with applicable redactions

16. When deciding on the defence’s request for the provision of public redacted versions of all filings associated with the conduct of Witnesses 169 and 178 - consistent with its responsibility pursuant to Article 64(2) of the

³⁹ Addendum to “Annex C to Victims and Witnesses Unit’s Report in relation to the Defence Motion ICC-01/05-01/08-2872-Conf pursuant to the Status Conference held on 26 November 2013 (ICC-01/05-01/08-2912-Conf-Exp-AnxC)”, 6 December 2013, ICC-01/05-01-08-2917-Conf-Exp+ 2912-Conf-Exp-AnxD.

⁴⁰ Decision on “Defence Motion Regarding Prosecution Disclosure”, 3 September 2012, ICC-01/05-01/08-2292, paragraph 9. *See also* 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, paragraph 34 (emphasis added).

Statute to guarantee the fairness of the proceedings - the Chamber must balance its duty to observe the principle of publicity of proceedings, pursuant to Articles 64(7) and 67(1) of the Statute and Regulation 20 of the Regulations of the Court, against its obligation under Article 68 of the Statute “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.

17. In this regard, the Chamber notes Maître Zarambaud’s submission that the allegations contained in the relevant filings have not been verified or confirmed and his assessment that communication of the allegations to the public would lead to confusion and negatively affect the victims participating in the *Bemba* case.⁴¹ The Chamber further notes that the VWU has been ordered to prepare a report on the issues addressed in the Prosecution Submission as soon as practicable, including [REDACTED].⁴² Pending completion of this report, the Chamber considers that publication of the relevant information might prejudice the Registry’s assessment and have a negative impact on the well-being of the individuals concerned. In view of the above, the Chamber considers that, at this stage, the request for reclassification should be rejected.

2. Provision of a lesser redacted version of the Prosecution Submission

a) Redactions to details of payments and benefits requested by Witness 169 or disbursed by the Court

18. The Chamber notes that most of the redactions challenged by the defence relate to details of payments and benefits requested by or provided to Witness 169. As acknowledged by the prosecution, in addition to the

⁴¹ ICC-01/05-01/08-2894-Conf, paragraphs 13 to 15.

⁴² ICC-01/05-01/08-2845-Conf-Red, paragraph 13(i).

redactions ordered by the Chamber in its 25 October Decision,⁴³ the prosecution applied redactions to “financial details and other information that could lead to identifying the working practices and security measures that the VWU employ to protect witnesses.”⁴⁴ Such redactions were applied in consultation with the VWU, following the Chamber’s instruction to that effect.⁴⁵ Furthermore, in its observations, the VWU confirmed that the relevant redactions are warranted.⁴⁶

19. As previously emphasized,⁴⁷ international criminal jurisprudence has established the principle 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 related thereto may be material to the preparation of the defence and are therefore disclosable to the defence.⁴⁸ In line with this general principle, the Chamber ordered the prosecution to disclose the information contained in the Prosecution Submission, with the application of limited redactions,⁴⁹ and the prosecution complied with this order.

20. In the present case, the Chamber notes the VWU’s submission that “in

⁴³ ICC-01/05-01/08-2845-Conf-Red, paragraph 12.

⁴⁴ ICC-01/05-01/08-2897-Conf, paragraphs 10 to 11.

⁴⁵ Email from the Chamber to the prosecution on 5 November 2013 at 12.53.

⁴⁶ ICC-01/05-01/08-2903-Conf, paragraphs 5 and 7.

⁴⁷ Decision on the “Defence request for modification of redactions”, 21 October 2011, ICC-01/05-01-08-1857-Conf, paragraphs 10 to 12.

⁴⁸ *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.

⁴⁹ ICC-01/05-01/08-2845-Conf-Red, paragraphs 10 to 11.

the area of protection the guiding principle should be that of non-disclosure” since “[REDACTED]”.⁵⁰ However, in relation to the information provided in the Prosecution Submission, the Chamber is of the view that more specific information on the details of payments or other benefits requested by or provided to Witness 169 appears to be material to the preparation of the defence. Moreover, the Chamber is not convinced that disclosure of such information would risk compromising the security measures employed by the VWU to protect witnesses,⁵¹ or enable identification of the required working practices of the VWU. In this regard, the Chamber further notes that Witness 169 [REDACTED].⁵² In addition, as set out in paragraphs 16 and 17 above, this Decision does not provide for communication of the information to the general public, but is limited to communication to the defence and the legal representatives of victims, who are bound by confidentiality requirements in accordance with the Code of Professional Conduct for counsel.⁵³

21. In view of the above, the Chamber orders the prosecution to file a lesser redacted version of the Prosecution Submission, lifting redactions to (i) the sums of money referred to in paragraph 13 and footnote 6 of document ICC-01/08-01/05-2827-Conf-Exp; (ii) the content of the email of 7 June 2013 in document ICC-01/08-01/05-2827-Conf-Exp-AnxA, page 2, with the exception of the witness’s place of residence; (iii) the last paragraph on the first page of the letter of 7 June 2013, and the sum of money and purpose of provision of the money in line 2 of the second page of the letter of 7 June 2013 (ICC-01/08-01/05-2827-Conf-Exp-AnxA, pages 3 and 4, and ICC-01/08-01/05-2827-Conf-Exp-AnxB, pages 5 to 6); and (iv) the content of the letter of 8 June 2013, with the exception of the witness’s contact details and information revealing his

⁵⁰ ICC-01/05-01/08-2912-Conf-Exp, paragraph 3.

⁵¹ ICC-01/05-01/08-2903-Conf, paragraph 3.

⁵² ICC-01/05-01/08-T-358-CONF-EXP-ENG ET, page 13, lines 17 to 22 and page 14, line 2.

⁵³ See in particular Article 8 of the Code of Professional Conduct for counsel.

place of residence and the name of the individual involved in the telephone conversation of 7 June 2013 (ICC-01/08-01/05-2827-Conf-Exp-AnxB, pages 3 to 4.)

22. In addition, the Chamber orders the prosecution to formally disclose the lesser redacted versions of the letters of 7 and 8 June 2013, as specified above, in accordance with the eCourt protocol.⁵⁴

b) Other redactions challenged by the defence

23. The defence further requests that the Chamber order the prosecution to lift redactions of the sender and some of the recipients of the emails of 7 and 10 June 2013.⁵⁵ The Chamber notes that these redactions refer to the email addresses of Witness 169 and a staff member of the prosecution's Operational Support Unit.⁵⁶ As such, the redactions in the emails are consistent with the Chamber's order. In relation to the redaction of the nationality of an individual called "[REDACTED]", the Chamber is of the view that the redaction of the nationality is appropriate to ensure confidentiality of the place of residence of the Individuals. Moreover, the Chamber is not convinced by the defence's argument that the nationality of this individual is not protected information because the name is known to the Chamber and the parties as someone who "[REDACTED]".⁵⁷ Nothing in the Prosecution Submission indicates that the "[REDACTED]" mentioned by Witness 169 is the same person as the intermediary referred to in Witness 73's testimony.⁵⁸ The Chamber therefore concludes that these redactions are in compliance with the 25 October Decision and the defence's submission that the relevant redactions are illogical and outside the Chamber's instructions is without

⁵⁴ ICC-01/05-01/08-971-Anx1.

⁵⁵ ICC-01/05-01/08-2872-Conf, paragraph 33.

⁵⁶ ICC-01/05-01/08-2827-Conf-Exp, footnote 3.

⁵⁷ ICC-01/05-01/08-2872-Conf, paragraph 34.

⁵⁸ See Transcript of hearing of 24 February 2011, ICC-01/05-01/08-T-73-Red-ENG WT, pages 15 to 34.

merit.

3. Disclosure of requests for and details of payments and other benefits in relation to Witnesses 169 and 178 and the Individuals

24. To determine whether the relevant information should be disclosed to the defence under Rule 77 of the Rules, useful guidance can be found in a recent judgement of the Appeals Chamber.⁵⁹ According to this judgement, Rule 77 of the Rules requires a two-step analysis: first, to determine whether the requested information is “material to the preparation of the defence”; and secondly, whether it falls within one of the exceptions to disclosure provided for in the Statute or in Rules 81 and 82 of the Rules.⁶⁰

25. Regarding the first step of the analysis, as recalled in paragraph 19 above, payments, benefits provided 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. According to the Prosecution Submission, Witness 169 stated that “many witnesses were contacted [and] gathered [REDACTED] by [Witness 178], mainly to look at loss of income claims and other”.⁶¹ In view of this statement, the Chamber considers that information related to the payments and benefits provided to the Individuals may be material to the preparation of the defence.

26. Turning to the second step of the analysis, the Chamber considers that

⁵⁹ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 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.

⁶⁰ ICC-02/05-03/09-501, paragraph 35. *See also The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public Redacted Version of Decision on Disclosure of Information related to Prosecution Intermediaries, 4 September 2013, ICC-01/09-01/11-904-Red, paragraph 26.

⁶¹ ICC-01/05-01-08-2827-Conf-Red, paragraph 9.

the relevant information does not fall within any of the exceptions to disclosure provided for in the Statute or in Rules 81 and 82 of the Rules. As a result, the Chamber concludes that the relevant information should be disclosed under Rule 77 of the Rules. For that purpose, the Chamber orders that documents 2912-Conf-Exp and 2912-Conf-Exp-AnxA be reclassified as confidential, available to all parties and participants.

4. Disclosure of material generated by the prosecution during contact with witnesses and intermediaries

27. In relation to the defence's request for disclosure of any material generated by the prosecution during its contact with witnesses and intermediaries, including "[REDACTED]", the Chamber considers it appropriate to distinguish between (i) Witnesses 169 and 178; (ii) Witnesses 119, 42, 38, 68⁶² and any of the other Individuals, and (iii) "[REDACTED]" or any other intermediary.

28. In view of the circumstances relating to Witnesses 169 and 178, in particular the correspondence sent by Witness 169 and the meetings allegedly convened by Witness 178, the Chamber considers that it may be material for the preparation of the defence to receive a comprehensive picture of the witnesses' interaction with the Court and any assistance requested by or provided to the witnesses. The relevant information is provided in Documents ICC-01/05-01/08-2912-Conf-Exp-AnxC and ICC-01/05-01/08-2912-Conf-Exp-AnxD.

29. Turning to the second step of the analysis, the Chamber considers that the information provided in the aforementioned documents does not fall within any of the exceptions to disclosure provided for in the Statute or in

⁶² These are the witnesses who provided information to the prosecution subsequent to their testimonies (ICC-01/05-01/08-2827-Conf-Red, paragraphs 12 to 14).

Rules 81 and 82 of the Rules. As a result, the Chamber concludes that the relevant information should be disclosed under Rule 77 of the Rules. Accordingly, the Chamber orders that Documents ICC-01/05-01/08-2912-Conf-Exp-AnxC and ICC-01/05-01/08-2912-Conf-Exp-AnxD be reclassified as confidential, available to all parties and participants.

30. In relation to the other Individuals, the Chamber notes that in the redacted version of the Prosecution Submission the prosecution informed the defence, the legal representatives of victims and the Chamber of the outcome of its contacts with those Individuals that it was able to contact.⁶³ According to the prosecution, Witnesses [REDACTED] declined any invitations to meetings allegedly convened by Witness 178.⁶⁴ Consequently, the Chamber is of the view that there is currently no suggestion that the prosecution is in possession of any additional related material that would have the potential to affect the credibility of the Individuals or be material to the preparation of the defence. In view of this conclusion, the Chamber does not need to proceed to the second step of the analysis under Rule 77 of the Rules.

31. Similarly, from the Prosecution Submission it does not appear that the prosecution has been in contact with an individual called “[REDACTED]” or any other intermediary. In this regard, and as stressed in paragraph 23 above, there is no information indicating that this individual is the intermediary mentioned during the testimony of Witness 73. Even assuming, *arguendo*, that it was the same person, the Chamber recalls that the involvement of this intermediary was addressed by the Chamber when it ordered the Victims Participation and Reparations Section (“VPRS”) to file a report on intermediaries [REDACTED] and ordered the VPRS to re-examine the

⁶³ According to the Prosecution Submission, these are Witnesses 119, 42, 38, and 68 (ICC-01-05-01/08-2827-Conf-Red, paragraphs 13 to 14).

⁶⁴ ICC-01/05-01/08-2827-Conf-Red, paragraph 13.

applications completed with their assistance.⁶⁵

32. This said, the Chamber reminds the prosecution that, should it be, or should it come to be in the future, in possession of any relevant material falling under Article 67(2) of the Statute and/or Rule 77 of the Rules, any such material is to be provided to the defence without delay.

5. Further investigation into the circumstances of contact and potential collusion between prosecution witnesses and request to recall Witnesses 169 and 178

33. The Chamber notes the defence's allegation that "virtually all the [REDACTED] witnesses called by the Prosecution had been promised by and/or were receiving sums of money from the ICC".⁶⁶ In relation to this allegation, the Chamber notes the VWU's submission that none of the Individuals received any financial assistance that goes beyond the requirements of ordinary subsistence.⁶⁷ This submission is further supported by ICC-01/05-01/08-2912-Conf-Exp-AnxA, which will be communicated to all parties and participants by virtue of the present Decision.

34. Similarly, the Chamber is not convinced by the defence's assertion that the witnesses "acted as a collective bargaining unit" or that there was "collusion" between them.⁶⁸ Indeed, the attempted contact allegedly initiated by Witness 178 took place *after* the relevant witnesses testified and, as noted

⁶⁵ See Decision on the Registry's "Report on issues concerning intermediaries' involvement in completion of applications for participation", 11 July 2011, ICC-01/05-01/08-1593-Conf; Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings, 19 July 2012, ICC-01/05-01/08-2247-Conf. A public redacted version was filed the same day: Public redacted versions of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings", 19 July 2012, ICC-01/05-01/08-2247-Red.

⁶⁶ ICC-01/05-01/08-2872-Conf, paragraph 43.

⁶⁷ ICC-01/05-01/08-T-358-CONF-EXP ENG ET, page 9, lines 6 to 11.

⁶⁸ For example, in ICTR, *The Prosecutor v. François Karera*, Case No. ICTR-2001-74-A, Appeals Chamber, Judgement, 2 February 2009, paragraph 234, the Appeals Chamber held that "collusion can be defined as an agreement, usually secret, between two or more persons for a fraudulent, unlawful, or deceitful purpose."

in the Prosecution Submission, those witnesses who could be contacted by the prosecution to verify the information stated that they refused to attend any such meeting. Accordingly, on the basis of the material before it, the Chamber finds that the defence's assertion regarding "collusion" of witnesses is unsubstantiated.

35. In relation to the defence's request to recall Witnesses 169 and 178, the Chamber previously held that while it will give due consideration to any request to recall a witness, it will not recall a witness simply because a party has obtained material after completion of the witness's testimony that it could have obtained through the exercise of reasonable diligence before the testimony.⁶⁹ The Chamber further notes that Chambers of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have held that in determining whether there are sufficient grounds to recall a witness, the Chamber needs to consider whether the requesting party has demonstrated *good cause* to recall a witness.⁷⁰ In addition, it has been stated that judicial economy demands that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature.⁷¹

⁶⁹ Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 12 July 2011, ICC-01/05-01/08-1594-Conf. A redacted version was filed on 29 July 2011, Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 29 July 2011, ICC-01/05-01/08-1594-Red.

⁷⁰ ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber I, Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, paragraph 2; ICTY, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber I, Decision on prosecution motion to recall Marko Rajčić, 24 April 2009, paragraph 10; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber II, Decision on the Defence Motion for the Re-examination of Defence Witness DE, 1 August 1998, paragraph 14. In assessing *good cause*, it has been held that a Chamber should consider the purpose for recalling the witness as well as the applicant's justification for not eliciting the relevant evidence from the witness when he or she originally testified: ICTY, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber I, Decision on prosecution motion to recall Marko Rajčić, 24 April 2009, paragraph 10; ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber I, Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, paragraph 2.

⁷¹ ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber I, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, paragraph 6. *See also* ICTY, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber I, Decision on prosecution motion to recall Marko Rajčić, 24 April 2009, paragraph 10; ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Chamber I, Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, paragraph 2.

36. In the present case, the specific communications were received after the testimony of Witnesses 178 and 169 in court. As a result, the Chamber acknowledges that the defence could not have obtained the communications through the exercise of reasonable diligence before the witnesses' testimony and could not have questioned the witnesses on the basis of the issues raised in the Prosecution Submission at the time of their testimony. However, the Chamber notes the defence's submission that disclosure of the requested information "put into admissible form for reception into evidence, may well obviate the need for the recall of any witnesses".⁷² In the present Decision, the Chamber orders the Registry to provide all parties and participants with any relevant information relating to the interactions between Witnesses 169 and 178 and the Court⁷³ and orders the prosecution to formally disclose the lesser redacted versions of the letters of 7 and 8 June 2013 in accordance with the eCourt protocol.⁷⁴

37. In order to enable the parties and participants, if they consider it necessary, to make submissions on issues relating to the witnesses' credibility on the basis of these documents in their closing submissions, the Chamber considers that a limited extension of the deadline for the submission of applications for the admission of material into evidence pursuant to Article 64(9)(a) is warranted.⁷⁵ Accordingly, the Chamber, pursuant to Regulation 35(2) of the Regulations, decides that any applications for the admission into evidence of the documents referred to in the present Decision may be submitted by 20 January 2014. If ultimately admitted into evidence by the

⁷² ICC-01/05-01/08-2872-Conf, paragraph 49.

⁷³ See paragraphs 24 to 26 of the present Decision.

⁷⁴ See paragraph 22 of the present Decision.

⁷⁵ In its decision of 30 October 2013, the Chamber set 8 November 2013 as the final deadline for the submission of any applications for the admission of any remaining material into evidence pursuant to Article 64(9)(a) of the Statute: Decision on the Motion for clarification and reconsideration of the timetable for the parties' final submissions of evidence, 30 October 2013, ICC-01/05-01/08-2855, paragraph 18(i).

Chamber following an assessment under the three-part admissibility test,⁷⁶ these documents may provide the parties and participants with an adequate basis to make any related submissions on the witnesses' credibility which they consider necessary. The Chamber therefore considers that there is no good cause to order the recall of Witnesses 169 and 178.

38. In view of the above, the Chamber hereby

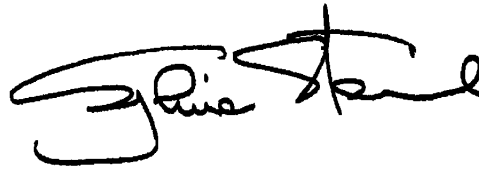
- (i) **REJECTS** the defence's request for reclassification as public of all filings related to the conduct of Witnesses 169 and 178;
- (ii) **GRANTS** the Defence Request for disclosure of a lesser redacted version of the Prosecution Submission;
- (iii) **ORDERS** the prosecution to file by 13 January 2014 a lesser redacted version of the Prosecution Submission in accordance with the directions set out in paragraph 21;
- (iv) **ORDERS** the prosecution to formally disclose by 13 January 2014 the lesser redacted versions of the letters of 7 and 8 June 2013 in accordance with the eCourt protocol;
- (v) **ORDERS** the Registry to reclassify documents ICC-01/05-01/08-2912-Conf-Exp, ICC-01/05-01/08-2912-Conf-Exp-AnxA, ICC-01/05-01/08-2912-Conf-Exp-AnxC, and ICC-01/05-01/08-2912-

⁷⁶ Namely that evidence must (i) be relevant; (ii) have probative value; and (iii) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause. *See* Public redacted version of the first decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red, paragraphs 13 to 16; Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012, 8 October 2012, ICC-01/05-01/08-2299-Red, paragraphs 7 to 9.

Conf-Exp-AnxD as confidential; and

- (vi) **REJECTS** the defence's request to recall Witnesses 169 and 178;
- (vii) **DECIDES** that any applications by the parties and participants for the admission into evidence of documents referred to in the present Decision are to be submitted by 20 January 2014.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 11 December 2014

At The Hague, The Netherlands