

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

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

Second Redacted version of "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)" of 2 October 2014

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

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Mr Peter Haynes

Ms Kate Gibson

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Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

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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"), hereby issues the following 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").

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 [REDACTED] 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

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 for 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 [REDACTED]. 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.

'Information on contacts of Witnesses 169 and 178 with other witnesses located [...]',⁵ 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 18 December 2013, the Chamber issued its "Decision on 'Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'" ("Decision 2924"),⁷ in which it, *inter alia*, rejected the defence's request⁸ to recall Witnesses P-169 and P-178.⁹
4. On 7 April 2014, the Chamber issued its "Decision on closure of evidence and other procedural matters" ("Decision 3035")¹⁰ in which it, *inter alia*, declared the submission of evidence closed pursuant to Rule 141(1) of the Rules.¹¹
5. On 11 September 2014, the prosecution filed its "Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-169" ("Prosecution Information"),¹² in which it informed the Chamber that on 3

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 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.

⁸ See Defence Motion concerning "Information on contacts with witnesses 169 and 178 with other witnesses", 11 November 2013, ICC-01/05-01/08-2872-Conf, a public redacted version was filed on 24 September 2014, ICC-01/05-01/08-2872-Red2.

⁹ ICC-01/05-01/08-2924-Conf, paragraph 38 (vi).

¹⁰ Decision on closure of evidence and other procedural matters, 7 April 2014, ICC-01/05-01/08-3035.

¹¹ ICC-01/05-01/08-3035, paragraph 7(i).

¹² 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

September 2014, the VWU transmitted to the prosecution another letter allegedly from Witness P-169 (the “5 August 2014 Letter”). 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.¹³ The prosecution disclosed the 5 August 2014 Letter to the defence, on 4 September 2014, pursuant to Article 67(2) of the Statute¹⁴ and seeks the Chamber’s limited intervention with respect to its potential admission into evidence and [REDACTED].¹⁵

6. The prosecution submits that it has evidence, emerging as a result of its Article 70 investigation,¹⁶ which bears directly on the possible impetus for the 5 August 2014 Letter.¹⁷ The prosecution also notes that Witness P-169’s [REDACTED] “is a serious breach of the Chamber’s protective orders which demands an immediate and robust response, including directing Witness P-169 to refrain from [REDACTED].”¹⁸ In light of its submissions, the prosecution requests that the Chamber:¹⁹

[O]rder P169 to refrain from [REDACTED] (“First Prosecution Request”);

[A]llow the Prosecution to introduce evidence from the Article 70 case bearing on the 5 August 2014 letter, to the extent the Chamber may be inclined to admit it into evidence (“Second Prosecution Request”); and

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.

¹³ ICC-01/05-01/08-3138-Conf-Red, paragraph 2.

¹⁴ 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.

¹⁵ ICC-01/05-01/08-3138-Conf-Red, paragraph 4.

¹⁶ Referring to the investigation conducted within the context of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13 (“case ICC-01/05-01/13”).

¹⁷ ICC-01/05-01/08-3138-Conf-Red, paragraph 15.

¹⁸ ICC-01/05-01/08-3138-Conf-Red, paragraph 19.

¹⁹ ICC-01/05-01/08-3138-Conf-Red, paragraph 21.

[In the alternative,] should the Chamber be inclined to admit any or all of P169's letters as relevant to the reliability of his testimony without the benefit of the Article 70 evidence, to recall the witness and hold a limited evidentiary hearing confined to assessing the witness's credibility in light of his recent behaviour ("Alternate Second Prosecution Request").

7. On 11 September 2014, the defence filed its "Defence Urgent Submission on the 5 August Letter" ("Defence Submission").²⁰ The defence notes that in its closing brief, the prosecution relied "unreservedly" on Witness P-169's testimony, and asserts that Witness P-169 is the "lynchpin" of the prosecution's case.²¹ The defence asserts that the 5 August 2014 Letter undermines the prosecution's case, renders any reliance upon Witness P-169 impossible and brings the credibility of the Relevant Witnesses further into question.²²
8. The defence asserts that the prosecution disclosed the 5 August 2014 Letter as exculpatory material, "accordingly, it must be taken to accept that it undermines the credibility of one or more of its witnesses."²³ Accordingly, the defence submits that the "only course of action open to the Trial Chamber which is consistent with open justice and the rights of the accused, is for the Chamber to disregard the testimony of P-169, and the 21 witnesses over whom a question-mark has now been raised".²⁴
9. "Absent an indication from the Chamber that it does not intend to rely on the evidence of either [Witness] P-169 or the [Relevant Witnesses]", the defence asserts that it should be given time to investigate the matters raised in the 5 August 2014 Letter and that suspension of all pending deadlines would be a

²⁰ 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.

²¹ ICC-01/05-01/08-3139-Conf, paragraphs 4 and 9.

²² ICC-01/05-01/08-3139-Conf, paragraphs 2, 9 and 12.

²³ ICC-01/05-01/08-3139-Conf, paragraph 16.

²⁴ ICC-01/05-01/08-3139-Conf, paragraphs 20 and 21.

necessary ancillary order.²⁵ Further, should the Chamber decline to disregard the testimony of Witness P-169 and the Relevant Witnesses, the defence states that it intends to interview Witness P-169 in order to explore his allegations,²⁶ in accordance with its right to investigate exculpatory issues at any stage of the proceedings.²⁷ The defence asserts that a meeting with Witness P-169 should take place prior to any defence request for recall of Witness P-169 or any of the Relevant Witnesses.²⁸

10. The defence also submits that the criteria for recall of Witness P-169, and the Relevant Witnesses, have been met.²⁹ The defence submits that the parties are entitled to explore the various questions raised by the 5 August 2014 Letter.³⁰ It notes that the Chamber found that the 2013 Letters met the criteria for admission into evidence³¹ and submits that the 5 August 2014 Letter also satisfies the three-part admissibility test.³² Upon admission of the 5 August 2014 Letter, the defence seeks the Chamber's leave to file supplemental submissions to Mr Bemba's closing brief.³³

11. In light of Witness P-169's widespread publication of the 5 August 2014 Letter, the defence asserts that there is little purpose in the Chamber keeping Witness P-

²⁵ ICC-01/05-01/08-3139-Conf, paragraph 49.

²⁶ ICC-01/05-01/08-3139-Conf, paragraph 22.

²⁷ ICC-01/05-01/08-3139-Conf, paragraphs 23 to 27.

²⁸ ICC-01/05-01/08-3139-Conf, paragraphs 28 and 29.

²⁹ ICC-01/05-01/08-3139-Conf, paragraph 31.

³⁰ ICC-01/05-01/08-3139-Conf, paragraph 31.

³¹ Referring to the Decision on "Defence Motion for the Admission of Documents related to Witness 169 and Witness 178, 13 March 2014, ICC-01/05-01/08-3015-Conf, in which indeed the 2013 Letters were admitted into evidence, see paragraphs 14 to 24.

³² ICC-01/05-01/08-3139-Conf, paragraphs 33 to 39.

³³ ICC-01/05-01/08-3139-Conf, paragraph 40.

169's correspondence, and the filings related to these documents, in redacted form, confidential.³⁴

12. The defence also notes that it did not receive the covering email to which the 5 August 2014 Letter was attached and requests that it be provided.³⁵

13. Further, the defence makes submissions in relation to another letter sent by Witness P-169 on 6 August 2011 ("2011 Letter"),³⁶ filed by the late legal representative of victims, Maître Zarambaud, as a confidential *ex parte* annex in response to a request from Mr Bemba for provisional release.³⁷ The defence notes that in 2011, the Chamber ordered that the defence be provided with a redacted version of the 2011 Letter.³⁸ Noting that the prosecution disclosed of the 5 August 2014 Letter to the defence without redactions, and in light of the information contained therein, the defence submits that the redactions applied to the 2011 Letter are now "without object".³⁹

14. In light of its submissions, the defence requests that the Chamber, *inter alia*:⁴⁰

DECLINE to rely on the testimony of P-169 or the 21 witnesses referred to in the Letter of 5 August in its deliberations pursuant to Article 74 of the Statute;

ADMIT the Letter of 5 August as evidence in the proceedings;

ORDER that the Defence be provided with an unredacted copy of the Letter of 6

³⁴ ICC-01/05-01/08-3139-Conf, paragraph 51.

³⁵ ICC-01/05-01/08-3139-Conf, paragraphs 45 to 47.

³⁶ Annex 1 to Observations de Maître Zarambaud Assingambi, Représentant légal de victimes, sur la demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République démocratique du Congo, en date du 24 août 2011, 29 August 2011, ICC-01/05-01/08-1660-Conf; Annex 2 to Demande du Représentant légal de victimes, Maître Zarambaud Assingambi à participer à la procédure d'appel suite à l'acte d'appel de la Défense du 1er septembre 2011, 5 September 2011, ICC/01/05-01/08-1704-Conf-Exp-Anx2.

³⁷ ICC-01/05-01/08-3139-Conf, paragraphs 41 to 42.

³⁸ ICC-01/05-01/08-3139-Conf, paragraph 43. The redacted version of the 2011 letter is ICC-01/05-01/08-1660-Conf-Anx1-Red.

³⁹ ICC-01/05-01/08-3139-Conf, paragraph 44.

⁴⁰ ICC-01/05-01/08-3139-Conf, paragraph 52.

August 2011;[...]

ORDER the reclassification as public [of] all filings and documents related to P-169 including but not limited to decisions 1727, 2165, 2924, 2980, 3015, 3063, 3077, and documents CAR-OTP-0083-1212; CAR-OTP-0083-1213 and ICC-01/05-01/08-1660-Conf-AnxA"; and

15. Should the Chamber decline to grant the above requests, the defence requests that the Chamber, *inter alia*:⁴¹

ADMIT the Letter of 5 August 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;

ORDER that VWU liaise with the Defence to facilitate contact between P- 169 and the Defence with a view to facilitating the potential recall of P-169 and other witnesses before the Chamber;

SUSPEND the timeframe for the filing of Mr. Bemba's Reply Brief and closing arguments for a period reasonable to allow the Defence to investigate the matters raised in the Letter of 5 August;

ORDER that the Defence be provided with an unredacted copy of the Letter of 6 August 2011; [...]

ORDER the reclassification as public all filings and documents related to P169 including but not limited to decisions 1727, 2165, 2924, 2980, 3015, 3063,3077, and documents CAR-OTP-0083-1212; CAR-OTP-0083-1213 and ICC01/05-01/08-1660-Conf-AnxA.

16. 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"

⁴¹ ICC-01/05-01/08-3139-Conf, paragraph 52.

("Defence Response"),⁴² in which it requests that the Chamber (i) "order the prosecution to disclose the information referred to in paragraph 15 of the prosecution's *ex parte* filing"; (ii) "order the VWU or the prosecution to disclose the cover email referred to in paragraph 11 of the prosecution *ex parte* filing"; (iii) "order the prosecution to desist from filing any further *ex parte* motion or applications to the Trial Chamber"; and (iv) "order the reclassification as confidential of all *ex parte* filings and annexed materials made hitherto".⁴³

17. In support of its requests, the defence, *inter alia*, notes that the prosecution acknowledged the possibility of recalling Witness P-169 and asserts that the prosecution's submissions "provide strong support for the case for recall."⁴⁴ The defence maintains that its primary submission is that the Chamber disregards Witness P-169 and the Relevant Witnesses' testimonies.⁴⁵ Absent such a finding, the defence submits that the recall of at least Witness P-169 "is the only course of action remaining."⁴⁶ The defence also maintains its request to interview Witness P-169 in advance of any recall.⁴⁷

18. On 16 September 2014, the prosecution filed its "Prosecution's Response to the 'Defence Urgent Submission on the 5 August letter'" ("Prosecution Response"),⁴⁸ in which the prosecution entreats the Chamber to reject the Defence Submission in part.⁴⁹ The prosecution submits that it does not oppose admitting the 5 August 2014 Letter in order to assist the Chamber's evaluation of Witness P-169's

⁴² 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.

⁴³ ICC-01/05-01/08-3146-Conf, paragraph 11.

⁴⁴ ICC-01/05-01/08-3146-Conf, paragraph 9.

⁴⁵ ICC-01/05-01/08-3146-Conf, paragraph 10.

⁴⁶ ICC-01/05-01/08-3146-Conf, paragraph 10.

⁴⁷ ICC-01/05-01/08-3146-Conf, paragraph 10.

⁴⁸ Prosecution's Response to the "Defence Urgent Submission on the 5 August letter", 16 September 2014, ICC-01/05-01/08-3144-Conf.

⁴⁹ ICC-01/05-01/08-3144-Conf, paragraph 1.

credibility or the recall of Witness P-169 in a limited evidentiary hearing confined to assessing the witness's credibility in light of his recent behaviour.⁵⁰ The prosecution opposes, and urges the Chamber to reject, the other defence requests.⁵¹

19. On 16 September 2014, the VWU filed its "Victims and Witnesses Unit's Second Report pursuant to ICC-01/05-01/08-2845-Conf-Exp" ("VWU Report 3143"),⁵² in which it informs the Chamber that it had only been able to establish contact with [REDACTED] of the Relevant Witnesses.⁵³ According to the VWU, [REDACTED].⁵⁴ [REDACTED],⁵⁵ [REDACTED],⁵⁶ [REDACTED]⁵⁷ [REDACTED]⁵⁸ [REDACTED].⁵⁹ [REDACTED].⁶⁰

20. The VWU further reports that in light of the 5 August 2014 Letter, it considers it [REDACTED].⁶¹ The VWU recommends that [REDACTED].⁶²

21. 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

⁵⁰ ICC-01/05-01/08-3144-Conf, paragraph 3.

⁵¹ Specifically, the prosecution opposes the defence's requests to (i) exclude Witness 169 and the Relevant Witnesses' testimony; (ii) receive an un-redacted copy of the 2011 letter; (iii) reclassify all filings related to Witness 169 as public; (iv) contact Witness 169; (v) file supplemental submissions to the closing brief; (vi) suspend the timeframe for the filing of the defence's closing reply brief. ICC-01/05-01/08-3144-Conf, paragraphs 1 and 21.

⁵² Victims and Witnesses Unit's Second Report pursuant to ICC-01/05-01/08-2845-Conf-Exp, 16 September 2014, ICC-01/05-01/08-3143-Conf-Exp along with Conf-Exp Annex A. A confidential version of VWU Report 3143 and its Annex was filed on 18 September 2014: ICC-01/05-01/08-3143-Conf-Red, along with ICC-01/05/01/08-3143-Conf-Anx-Corr-Red.

⁵³ ICC-01/05-01/08-3143-Conf-Red, paragraph 2. The VWU confirmed that in addition to [REDACTED]. See Annex to the Victims and Witnesses Unit's Report pursuant to ICC-01/05-01/08-2845-Conf-Exp, 17 February 2014, ICC-01/05/01/08-2975-Conf-Red; ICC-01/05-3143-Conf-Anx-Corr-Red.

⁵⁴ ICC-01/05/01/08-2975-Conf-Red, pages 2 to 4.

⁵⁵ ICC-01/05/01/08-2975-Conf-Red, page 3.

⁵⁶ ICC-01/05-01/08-3143-Conf-Anx-Corr-Red, page 2.

⁵⁷ ICC-01/05-01/08-3143-Conf-Anx-Corr-Red, page 3.

⁵⁸ ICC-01/05-01/08-3143-Conf-Anx-Corr-Red, page 5.

⁵⁹ ICC-01/05-01/08-3143-Conf-Anx-Corr-Red, page 3 to 4.

⁶⁰ ICC-01/05-01/08-3143-Conf-Anx-Corr-Red, pages 4 to 5.

⁶¹ ICC-01/05-01/08-3143-Conf-Red, paragraph 3.

⁶² ICC-01/05-01/08-3143-Conf-Red, paragraph 4.

'Defense Urgent Submission on the 5 August Letter', ICC-01/05-01/08-3139-Conf"⁶³, in which she requests, *inter alia*, that the Chamber reject the defence's requests (i) to disregard Witness P-169 and the Relevant Witnesses' testimonies; (ii) to receive a copy of the un-redacted version of the 2011 Letter; and (iii) for the reclassification of the documents and filings related to Witness P-169 as public.⁶⁴ In the event the Chamber grants the defence's request to make additional supplemental submissions, Me Douzima seeks to be afforded the right to respond to the submission.⁶⁵

22. On 23 September 2014, the Chamber convened a *status conference* to hear additional submissions from the parties, legal representative and the Registry, including the VWU, related to the Prosecution Information and the Defence Submission.⁶⁶ During the status conference, the Chamber issued an oral decision rejecting the defence's request to suspend the time frame for the filing of the defence's reply brief.⁶⁷

23. On 24 September 2014, in view of the urgency of the matter and pending issuance of the present Decision, the Chamber sent an email (i) indicating that it intends to recall Witness P-169 as a Chamber witness;⁶⁸ (ii) ordering the Registry to make the necessary arrangements for the testimony of Witness P-169 to take place at the seat of the Court as of 14 October 2014 (excluding 16 October in the

⁶³ "Rectificatif à la Réponse de la Représentante légale des victimes, Me. Marie-Edith Douzima-Lawson, à la 'Defense Urgent Submission on the 5 August Letter', ICC-01/05-01/08-3139-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-01/05-01/083195-Conf", 16 September 2014, ICC-01/05-01/08-3145-Conf.

⁶⁴ ICC-01/05-01/08-3145-Conf-Corr, page 12.

⁶⁵ ICC-01/05-01/08-3145-Conf-Corr, paragraph 36.

⁶⁶ 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.

⁶⁷ ICC-01/05-01/08-T-360-CONF-ENG ET, page 53, line 13 to 15.

⁶⁸ Email from the Chamber to the Registry, the parties and participant on 24 September 2014 at 17.34. In the email, the Chamber also informed the parties, legal representative, and Registry that the Chamber's reasoning and further details will be issued in due course; the Chamber fulfils this obligation in the present Decision.

afternoon and 17 October); (iii) ordering the Registry to (a) file the cover email of the 5 August 2014 Letter as a confidential document; and (b) file by Thursday, 25 September 2014, a lesser redacted version of the 2011 Letter (ICC-01/05-01/08-1660-Conf-Exp-Anx1); and (iv) anticipates hearing the final oral submissions in the *Bemba* case during the week of 10 November 2014.

II. Analysis and Conclusions

24. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Chamber has considered Articles 64(2), 6(b), (d) and (f), and (7), 67 to 69 of the Statute, Rules 67, 77 and 141(1) of the Rules and Regulations 20 and 23bis(3) of the Regulations of the Court ("Regulations").

Reopening of evidence, recall of Witness 169 and related matters

25. In Decision 3035, the Chamber pronounced the submission of evidence closed pursuant to Rule 141(1) of the Rules.⁶⁹ The Chamber notes that the Statute and Rules does not expressly provide for a reopening of the case in order to permit the submission of additional evidence. However, in line with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"),⁷⁰ the Chamber finds that in exceptional circumstances a case may be reopened to

⁶⁹ ICC-01/05-01/08-3035, paragraph 7.

⁷⁰ See ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on prosecution motion to reopen its case and prosecution motion for protective measures for Witness KDZ614 ("Karadžić Decision"), 20 March 2014, paragraphs 9 to 11; ICTY, *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T Decision granting Župljanin motion to reopen defence case ("Stanišić Decision"), 3 April 2012, paragraphs 5 to 7; ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivok Petković, Valentin Ćorić, and Berislav Pušić*, Case No. IT-04-74-T, Decision on the Stojić defence request to reopen its case ("Stojić Decision"), 25 November 2010, paragraphs 15 to 18; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, paragraph 23; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Decision on Application For a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution", 13 December 2005, paragraph 12; ICTY, *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, Decision on the Prosecution's Application to Re-open Its Case, public, 1 June 2005, paragraph 31; and *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case", 19 August 1998, paragraph 26.

permit the presentation of “fresh” evidence.⁷¹ The Chamber notes that “fresh” evidence includes not only evidence which was not available at the closing of the case but also evidence that was previously available but the importance of which was revealed only in light of new evidence.⁷²

26. In determining whether to reopen a case to allow for the admission of “fresh” evidence, the Chamber must first consider whether, with reasonable diligence, the evidence could have been identified and presented prior to the closing of evidence.⁷³

27. Further, in determining whether there are sufficient grounds to recall a witness, the Chamber shall consider whether *good cause* to recall the witness has been demonstrated.⁷⁴ The Chamber has previously stated that “judicial economy demands that recall should be granted only in the most compelling

⁷¹ See *Stojić Decision*, paragraph 15 (internal citations omitted).

⁷² See *Stojić Decision*, paragraph 17 (internal citations omitted).

⁷³ See *Karadžić Decision*, paragraph 9; *Stanišić Decision*, paragraph 5; *Stojić Decision*, paragraph 16 (internal quotation omitted). In this respect, the Chamber notes that Trial Chamber I in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, when deciding on a request to admit rebuttal evidence, considered that three conditions need to be fulfilled: First, it must be demonstrated that an issue of significance has arisen *ex improvisé*. Second, the evidence on rebuttal has to satisfy the admissibility criteria. Third, it must be ensured that the submission of rebuttal evidence “will not undermine the accused’s rights, in particular under Article 67 of the Statute”: Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, 28 April 2011, ICC-01/04-01/06-2727-Red, paragraph 43.

⁷⁴ See Decision on “Defence Motion concerning ‘Information on [REDACTED] Witnesses 169 and 178 [REDACTED]”, 18 December 2013, ICC-01/05-01/08-2924-Conf, paragraph 35. See also 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.

circumstances where the evidence is of significant probative value and not of a cumulative nature”.⁷⁵

28. In the present case, the Chamber has been alerted of a recent letter allegedly written by Witness P-169 in which the witness reiterates his previous allegations, including the allegations that [REDACTED] and had outstanding claims for compensation.⁷⁶ However, in allegations not mentioned in the previous letters, Witness P-169 mentions “the money transferred by the ICC prosecution for the benefit of witnesses”⁷⁷ and alleges that he has information on the “subordination” and ill-treatment of the Relevant Witnesses.⁷⁸

29. The Chamber notes that in Decision 2924, it ruled against the recall of Witness P-169.⁷⁹ However, in light of the nature of the allegations made in the 5 August 2014 Letter - in particular the witness’s purported claims that he has information on the “subordination” and ill-treatment of the Relevant Witnesses and “money transferred by the ICC prosecution” - and noting that neither the parties nor the legal representative object in principle to the recall of Witness P-169, the Chamber considers that there are exceptional circumstances which warrants the reopening of the evidence and the recall Witness P-169. Although reopening the evidence may cause some delays in the proceedings, the Chamber notes that in the Defence Submission, the defence favours the recall of Witness P-169.⁸⁰

⁷⁵ ICC-01/05-01/08-2924-Conf, paragraph 35.

⁷⁶ ICC-01/05-01/08-3138-Conf -AnxA.

⁷⁷ ICC-01/05-01/08-3138-Conf-AnxA. Specifically, the letter states [REDACTED].”

⁷⁸ ICC-01/05-01/08-3138-Conf-AnxA. Specifically, the letter states, [REDACTED].”

⁷⁹ ICC-01/05-01/08-2924-Conf, paragraph 38 (vi).

⁸⁰ ICC-01/05-01/08-3146-Conf, paragraph 10. *See also*, ICC-01/05-01/08-3138-Conf, paragraphs 22 to 32.

30. As noted in the Chamber's Second decision on issues related to the closing of the case,⁸¹ the Chamber may decide to call additional witnesses and order the submission of such evidence as it considers necessary for the determination of the truth pursuant to Articles 64(6)(d) and 69(3) of the Statute. In light of the above, the Chamber considers it appropriate to recall Witness P-169 to testify as a Chamber's witness with regard to the issues related to the 5 August 2014 Letter.
31. The Chamber considers that the scope of questioning should be limited to issues arising out of Witness P-169's various allegations and issues of witness credibility.⁸² Further instructions on the modalities of the testimony will be provided in due course.
32. In the interest of expeditiousness, the Chamber has already ordered the Registry "to make the necessary arrangements for the testimony of Witness P-169 to take place at the seat of the Court as of 14 October 2014".⁸³ In the event that logistical difficulties prevent the witness from travelling to the seat of the Court and starting his testimony as of 14 October 2014, the Chamber may consider hearing his testimony *viva voce* by means of video technology.
33. Further, the Chamber considers that following the testimony of Witness P-169 the parties and legal representative shall be afforded an opportunity to make written submissions in relation to his testimony and any related evidence.

⁸¹ Second decision on issues related to the closing of the case, 18 October 2013, ICC-01/05-01/08-2837-Red, paragraph 19.

⁸² Of particular relevance in this regard are: the 5 August 2014 Letter; the 2013 Letters; the 2011 Letter; [REDACTED], 4 October 2011, ICC-01/05-01/08-1816-Conf, with confidential redacted Annexes 1, 3, and 4; 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, 29 November 2013, ICC-01/05-01/08-2912-Conf and confidential Annexes A and C; Victims and Witnesses Unit's Report pursuant to ICC-01/05-01/08-2845-Conf-Exp, 17 February 2014, ICC-01/05-01/08-2975-Conf-Red; Victims and Witnesses Unit report pursuant to Decision ICC-01/05-01/08-3077-Conf, 27 June 2014, ICC-01/05-01/08-3099-Conf; VWU Report 3143 and Prosecution's Report to the Trial Chamber III on [REDACTED] of Witnesses 169 and 178, 15 August 2011, ICC-01/05-01/08-1623-Conf-Red.

⁸³ Email from the Chamber to the Registry, the parties and participant on 24 September 2014 at 17.34.

Further instructions on the modalities of these additional submissions will be issued in due course.

34. If the prosecution intends to contact the Relevant Witnesses to obtain declarations in relation to any contact they may have had with Witnesses P-169 or P-178, in consultation with the VWU to establish contact if necessary, the contacts should be accurately recorded and disclosed at the earliest opportunity. In the same vein, the Chamber instructs the VWU to report on the [REDACTED] by 10 October 2014. In this regard, the VWU shall file a confidential *ex parte* version of its report, Registry and Prosecution only, as well as a confidential version simultaneously.

Prosecution Requests

35. In the First Prosecution Request, the prosecution seeks an order from the Chamber that Witness P-169 refrain from [REDACTED]. In view of its decision to recall the witness, the Chamber defers its decision on this matter.
36. Pending the recall of Witness P-169, the Chamber finds it premature to render a decision on the admission of the 5 August 2014 Letter; thus, the Chamber defers any decision on the Second Prosecution Request and the Alternate Second Prosecution Request.

Defence Requests

37. As a preliminary issue, the Chamber notes that it previously granted the defence requests for (i) any covering email or correspondence to the 2014 Letter,⁸⁴ and (ii)

⁸⁴ Email from the Chamber to the Registry, the parties and participant on 24 September 2014 at 17.34.

an abridgement of the time in which the prosecution may respond to the Defence Submission.⁸⁵ The Chamber also notes that it denied the defence's request to suspend the timeframe for the filing of Mr Bemba's reply brief.⁸⁶

38. Further, pending the recall of Witness P-169, the Chamber defers any decision on the defence's requests that the Chamber (i) decline to rely on the testimony of Witness P-169 or the Relevant Witnesses; (ii) admit, at this stage, the 5 August 2014 Letter as evidence; and (iii) grant the defence, at this stage, leave to file a supplemental submission to Mr Bemba's closing brief on the basis of the 5 August 2014 Letter in the event that the letter is admitted into evidence. Accordingly, the Chamber will not address Me Douzima's request to be allowed to respond to any supplemental submission by the defence in this regard.

39. Regarding the defence's request for an un-redacted copy of the 2011 Letter, the Chamber is unconvinced by Me Douzima's contention that the redactions applied to all sensitive information in the 2011 Letter remains valid.⁸⁷ However, the Chamber considers that while certain redactions in the 2011 Letter no longer require confidential treatment, the names of certain third parties should remain confidential. As such, the Chamber denies the defence request for an un-redacted copy of the 2011 Letter. Rather, the Chamber, as a matter of urgency and to allow the defence to adequately prepare for Witness 169's testimony, ordered, by way of an email, that the prosecution file a lesser redacted version of the 2011 Letter.⁸⁸

40. Regarding the defence's request for the reclassification as public of all filings and documents related to Witness P-169, the Chamber notes that the publicity of the

⁸⁵ Email from the Chamber to the parties and participant, 12 September 2014 at 09.24.

⁸⁶ ICC-01/05-01/08-T-360-CONF-ENG ET, page 53, lines 13 to 15.

⁸⁷ ICC-01/05-01/08-3145-Conf, paragraph 29.

⁸⁸ Email from the Chamber to the prosecution, defence, participant, and Registry on 25 September 2014 at 17.37.

proceedings is a well-established principle which has consistently been stressed in the decisions of this Chamber and in jurisprudence of this Court.⁸⁹ However, it has also been acknowledged that this principle is not absolute and needs to be balanced against, in particular, the Chamber's duty under Article 68(1) of the Statute "to protect the safety, physical, psychological well-being, dignity and privacy of victims and witnesses".⁹⁰

41. The Chamber notes the defence's contention that in light of the intended widespread publication of the 5 August 2014 Letter, "there is little purpose in the document itself, suitably redacted, nor the filings relating to it, remaining confidential".⁹¹ The Chamber also notes its "Decision on defence further request for reclassification of documents related to Witness 169 and Witness 178" ("Decision 3063"),⁹² in which it, *inter alia*, directed the parties, Me Douzima and the Registry to file public redacted versions of a number of documents related to Witness P-169 and declined the defence's request to reclassify the communications sent by Witness 169 as public.⁹³ Despite the alleged widespread dissemination of the 5 August 2014 Letter, the Chamber considers that the reasoning underlying Decision 3063 remains valid. Specifically, the Chamber notes that the communications from Witness 169 [REDACTED]. In light of the

⁸⁹ See, for example, Trial Chamber IV, *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, paragraph 43; and Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of hearing of 20 September 2010, ICC-01/04-01/07-T-189-ENG ET WT, page 10, lines 12 to 20.

⁹⁰ See for example, ICC-01/04-01/07-T-189-ENG ET WT, page 10, line 21 to page 11, line 5; Decision on in-court protective measures for [REDACTED], 19 November 2010, ICC-01/05-01/08-1021-Conf, paragraph 24 and 25; Decision on in-court protective measures for [REDACTED], 24 January 2012, ICC-01/05-01/08-2063-Conf, paragraph 16; and Decision on in-court protective measures for [REDACTED], 9 March 2012, ICC-01/05-01/08-2160-Conf, paragraph 9.

⁹¹ ICC-01/05-01/08-3139-Conf, paragraph 51.

⁹² Decision on defence further request for reclassification of documents related to Witness 169 and Witness 178, 7 May 2014, ICC-01/05-01/08-3063-Conf.

⁹³ ICC-01/05-01/08-3063, paragraphs 30 and 31.

above, and pending the recall of Witness P-169, the Chamber denies the defence's general request for the reclassification as public of *all* filings and documents related to Witness P-169.

42. However, in exercising its duty to review on a case-by-case basis the level of confidentiality of its own decisions, and in keeping with Decision 3063 and the principle of publicity of the proceedings, the Chamber will file public redacted versions of the Chamber's decisions related to Witnesses P-169 and P-178 in due course.

43. Regarding the defence request that the Chamber 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 Witness P-169 and other witnesses before the Chamber, the Chamber notes that it has elected to recall Witness P-169 as a Chamber witness. Thus, it would be wholly inappropriate for either of the parties or the legal representative of victims to contact the witness prior to his testimony. Given that Witness P-169 was previously called by the prosecution, the VWU shall, if necessary, seek the prosecution's assistance only to the extent that it is necessary to facilitate contact between the VWU and the witness.⁹⁴ In light of the above, the Chamber denies the defence's request in this regard.

44. In relation to the defence's request that the Chamber suspend the closing arguments for a period reasonable to allow the defence to investigate the matters raised in the 5 August 2014 Letter, the Chamber partially grants the defence's request by delaying the closing arguments in order to permit the recall of Witness P-169 and allow for additional submissions.

⁹⁴ See Annex: Victims and Witnesses Unit's amended version of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" submitted on 22 October 2010, ICC-01/05-01/08-1081-Anx.

45. Regarding the defence's request that the Chamber order the prosecution to disclose information referred to in paragraph 15 of the Prosecution Information, the Chamber notes that in the referenced paragraph, the prosecution states that it "has evidence which bears directly on the possible impetus for P169's 5 August 2014 letter, which emerges as a result of its Article 70 investigation."⁹⁵
46. The Chamber notes its decisions articulating its understanding of the prosecution's disclosure obligations.⁹⁶ In line with those decisions, the Chamber finds that the information referenced in paragraph 15 of the Prosecution Information is material to the preparation of the defence as they may allow the defence to assess Witness P-169's evidence and credibility. The information may also affect the credibility of prosecution evidence. In light of the above, the Chamber instructs the prosecution to disclose the relevant materials, bearing in mind any consideration as to whether restrictions on disclosure should be imposed pursuant to the Statute and Rules 81 and 82 of the Rules.⁹⁷
47. Regarding the defence's request that the Chamber order the prosecution to desist from filing any further *ex parte* filings, the Chamber finds that this request has no basis in law or fact. The statutory framework does not prevent any party from making *ex parte* filings at any stage of the proceedings. Therefore, the Chamber denies the defence's request in this regard.

⁹⁵ ICC-01/05-01/08-3138-Conf-Red, paragraph 15.

⁹⁶ See, *inter alia*, 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; Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paragraphs 215 and 216.

⁹⁷ 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 35.

48. In relation to the defence's request that the Chamber order the reclassification as "confidential of all *ex parte* and annexed material made hitherto", the Chamber finds the defence's request overly general and speculative. Thus, the Chamber denies the defence's request. However, where the Chamber itself finds that the basis for the *ex parte* classification of a document no longer exists, in accordance with Regulation 23bis(3) of the Regulations, the Chamber shall order its reclassification, as it did in relation to the Prosecution Information⁹⁸ and has done throughout the course of the proceedings. The Chamber also reminds the parties and legal representative that pursuant to Regulation 23bis(3) of the Regulations, the party that instigated a document's classification has an affirmative obligation to apply to the Chamber to reclassify the document once the basis of the classification no longer exists.

VWU submission

49. In regard to the issues on which the VWU requests the Chamber's guidance, the Chamber notes its decision in paragraph 35 above in relation to Witness P-169. As the [REDACTED].

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

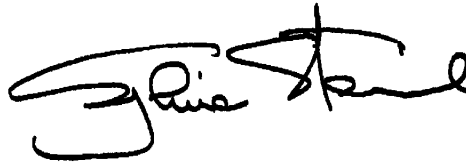
- (i) ORDERS the recall of Witness P-169 to testify at the seat of the Court;
- (ii) ORDERS the reopening of the presentation of evidence for the limited purpose of hearing Witness P-169 in relation to issues arising out of his various allegations and issues of witness credibility;

⁹⁸ Email from the Chamber to the parties and the legal representative on 12 September 2014 at 09.24.

- (iii) DIRECTS the VWU to file a report [REDACTED], simultaneously filing confidential *ex parte* and confidential versions of the report;
- (iv) DEFERS its decision on the admission of the 5 August 2014 Letter as evidence in the proceedings;
- (v) DEFERS its decision on the First, Second, and Alternate Second Prosecution Requests;
- (vi) DEFERS any decision on whether to decline to rely on the testimony of Witness P-169 or the Relevant Witnesses;
- (vii) DEFERS its decision on whether to grant the defence leave to file a supplemental submission to Mr Bemba's closing brief on the basis of the 5 August 2014 Letter in the event that the letter is admitted;
- (viii) DENIES the defence's request for an un-redacted copy of the 2011 Letter;
- (ix) DENIES the defence's request for the reclassification as public of all filings and documents related to Witness P-169;
- (x) DENIES the defence's request that the VWU liaise with the defence to facilitate contact between Witness P-169 and the defence;
- (xi) PARTIALLY GRANTS the defence's request that the Chamber suspend the timeframe for closing arguments;
- (xii) ORDERS the prosecution to disclose the information referenced in paragraph 15 of the Prosecution Information to the defence;
- (xiii) DENIES the defence's request that the Chamber order the prosecution to desist from filing any further *ex parte* motions or applications to the Chamber;
- (xiv) DENIES the defence's request that the Chamber order the reclassification of all *ex parte* filings and annexed materials as confidential;

- (xv) DECIDES that the final oral submissions will be presented during the week of 10 November 2014, unless otherwise decided; and
- (xvi) DECIDES that following Witness P-169's testimony, the prosecution and the legal representative shall have seven days, and the defence shall have 14 days to file additional submissions to their closing briefs. These additional submissions shall relate exclusively to Witness P-169's testimony and any related evidence admitted by the Chamber.

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