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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**

Confidential

Defence Reply to the "Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'"

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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A. BACKGROUND

1. On 9 October 2014, the Defence filed its “Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure”, in which it asked the Chamber to order disclosure of, *inter alia*, the Prosecution’s communication with P-169, and the 21 witnesses referred in his correspondence, and all payments made to these witnesses.¹ The Defence also sought remedies for the non-disclosure of a letter sent by P-169 to the Prosecution in June 2014 (“11 June Letter”), which was only disclosed to the Defence on 7 October 2014. The Prosecution had also disclosed material detailing payments made by the Prosecution to P-169 following the completion of his testimony, notably one payment in the amount of [REDACTED]

2. The Prosecution response was filed on 10 October 2014.² Claiming compliance with its disclosure obligations, the Prosecution appended an unsigned and undated internal Prosecution memorandum (“Memo”), which demonstrated that the 11 June Letter was indeed received by the Prosecution on 13 June 2014, but a practice of communicating with witnesses via external or “Hotmail” email accounts, but then not monitoring these email accounts, meant it had not been disclosed. The Memo also revealed that P-169 was not the only witness who had been communicating with the Prosecution via this email account.³ The Prosecution further submitted that the payment of [REDACTED] to P-169 in fact “was made on behalf of the Victims and Witnesses Unit (“VWU”).”⁴

3. The Defence sought leave to reply to the Prosecution Response.⁵ The Chamber granted the Defence request on 14 October 2014, authorising the Defence to file submissions on the issues set out below.⁶

B. SUBMISSIONS

(i) The Prosecution has erred in framing its disclosure obligations too narrowly

¹ ICC-01/05-01/08-3159-Conf.

² ICC-01/05-01/08-3160-Conf.

³ ICC-01/05-01/08-3160-Conf-AnxA, p.3.

⁴ ICC-01/05-01/08-3160-Conf, para. 3.

⁵ ICC-01/05-01/08-3164-Conf.

⁶ ICC-01/05-01/08-3165-Conf.

4. From the outset of this trial, the Trial Chamber has confirmed that the Prosecution's disclosure obligation is not limited to the disclosure of formal witness statement but can encompass any information concerning witnesses within the possession of the Prosecution - including internal records such as screening and investigators' notes - that are either exculpatory or material to the preparation of the Defence, and for which the Chamber has not authorised non-disclosure.⁷

5. In line with this ruling, there is no form of internal privilege for correspondence with witnesses, or information concerning witness payments. If such information is material to the preparation of the Defence, it must therefore be disclosed. Nonetheless, whilst the Prosecution appears to recognise as such at paragraph 7 of its Response, it also claims that "[t]he expenses related to the other 21 witnesses listed by P-0169 do not fall under Rule 77 as they relate to reimbursements of ordinary expenses".⁸

6. It therefore appears that the Prosecution is attempting to carve out a form of privilege for information concerning 'ordinary expenses'. Whilst the Defence agrees that information concerning 'ordinary expenses' is not automatically disclosable in every case and in relation to every witness, the Prosecution has failed to comply with its duty to consider whether, in light of the particular circumstances of the current litigation, such information *could* be relevant to the witnesses' state of mind, and apparent belief that their testimony may have been linked to assistance from the Prosecution (irrespective as to whether such assistance was 'ordinary' or not).

7. Thus, in the *Haradinaj* case, the Trial Chamber sanctioned the Prosecution for its failure to provide all relevant correspondence concerning assistance provided by the Prosecution to a witness.⁹ The assistance post-dated the witness's agreement to provide a statement and the provision of the statement itself.¹⁰ Notably, the Chamber confirmed that although the assistance itself was not improper, it was clearly relevant to the witness' credibility, and raised an issue as to "whether he may feel obliged to return the favour by testifying favourably for the Prosecution".¹¹ It was also unnecessary for the Defence to demonstrate that the assistance had in fact affected the witness' credibility; the Prosecutor

⁷ ICC-01/05-01/08-750-Red.

⁸ Prosecution Response, para. 5.

⁹ 'Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis', 12 October 2011.

¹⁰ Para. 18.

¹¹ Para. 45.

was obliged to disclose the information if there was any possibility that it could have affected credibility.¹² Finally, and most significantly, notwithstanding the Prosecution's claim that not every letter or email contained information that affected the witness's credibility,¹³ the Chamber emphasised that the Prosecution was obliged to disclose "**all the materials in its possession** concerning Witness 75's asylum case because Witness 75 requested and, in fact, did receive a benefit from being a Prosecution witness" (emphasis added).¹⁴

8. The nub of P-169's recall is to hear testimony in relation to his assertion that there was a 'market of deception', which involved himself, twenty one other witnesses, and offers of assistance from the Prosecution and/or VWU. Irrespective as to whether this was the intent or objective of the Prosecution or VWU, P-169 claims that the effect of any offers of assistance was to 'suborn' the testimony of these persons.

9. The objective of the current stage of the proceedings is not to investigate the Prosecution and the VWU for wrongdoing, but to examine the state of mind of the persons, who were allegedly part of this 'market' in order to assess whether the voluntariness and veracity of their testimony may have been impacted by extraneous circumstances.

10. In light of the possibility that P-169 may have contacted one or more witnesses in order to lobby for greater forms of assistance, it would clearly be instructive for the parties to be in a position to compare the quantity of assistance that might have been provided to the different witnesses. Indeed, the fact that some witnesses may have only received 'ordinary assistance' whereas other may have received more, could in itself, be relevant to their motivation to liaise with each other on such matters.

11. The Prosecution has also erred by advancing the fallacious position that the disclosure of some but not all relevant information satisfies its duties.¹⁵ Having recognised that certain letters from P-169 are not only relevant to the preparation to the Defence, but potentially exculpatory, it is illogical and arbitrary to refuse disclosure of other records of correspondence.

¹² Para. 38.

¹³ Para. 29.

¹⁴ Para. 54. See also *Prosecutor v Karadzic*, No. IT-95-5/18-T, Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, 22 November 2011, para. 23.

¹⁵ Prosecution Response, paras. 7 and 8.

12. As a matter of law, if information is material to the preparation of the Defence – it should be disclosed, irrespective as to whether the Prosecution may have disclosed other, similar information. Contrary to the specific quote relied upon by the Prosecution (which is cited out of context),¹⁶ the Appeals Chamber has underscored firstly, that the notion of materiality must be construed broadly, and on a *prima facie* basis,¹⁷ and secondly that the Chamber must exercise caution in order to uphold the “paramount right of the defence to disclosure of all information”.¹⁸ The customary deference to the Prosecutor’s appreciation as to what is and is not disclosable also does not apply in circumstances where the Prosecution may have made an error of law as to the proper scope of its disclosure obligations.¹⁹

13. Given that the entire corpus of correspondence with the 22 witnesses is potentially disclosable, the Prosecution Response fails to provide any explanation or justification as to why they consider such correspondence to be irrelevant to a hearing, which has been convened for the very purpose of hearing testimony on such correspondence!

14. A ‘market’ is based on a system of exchanges. It is critical for the Defence to be in a position to access and assess any ‘exchanges’ between the Prosecution and the witnesses in question in order to assess whether there are any indicia that the witnesses in question might have been under the belief that their testimony was contingent on, or conditioned by external factors.

15. The objective of the upcoming hearing is to hear testimony on the impact of any promised assistance (including financial assistance, relocation or different forms of protection) on the voluntariness of the witnesses’ testimony. It is not limited to hearing testimony on the events, which were the subject of the charges. The Prosecutor’s disclosure obligations must therefore be tailored to this objective.

16. Whereas access to correspondence between the Prosecution and witnesses on issues other than the subject matter of the charges might not necessarily facilitate the preparation of

¹⁶ The cited decision (ICC-01/05-01/08-632) concerned a Defence request to be provided with access to all correspondence between the Prosecution and the DRC for the purposes of an admissibility challenge, notwithstanding the Prosecution’s averral that any correspondence that had not been disclosed had no relevance to admissibility issues.

¹⁷ ICC-02/05-03/09-501, para. 2.

¹⁸ ICC-02/05-03/09-501, para. 40.

¹⁹ *Prosecutor v Karadžić*, No. IT-95-5/18-T, Decision on Accused’s Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, 22 November 2011, para. 20.

the Defence in relation to testimony concerning the charges, it would materially facilitate the ability of the Defence to prepare its case in relation to the impact of the Prosecution's acts, offers, and statements on the testimony of the witnesses. The Prosecution has no privilege against self-incrimination. It is therefore highly inappropriate for the Prosecution to use its power as the gate keeper for disclosure to deny the Defence access to information that might either be evidence in itself of the 'market', or crucial to the Defence's understanding as to why P-169 might have perceived that there was such a market.

17. Given that the Prosecution is fully acquainted with the contents of these communications, it is also self-evident that the Prosecution will have a significant advantage over the defence in terms of its ability to question P-169 on such correspondence and to frame its strategy accordingly. In contrast, the Defence will be compelled to elicit such information for the first time in the courtroom, and to formulate its strategy 'on the hoof' without the benefit of instructions from Mr. Bemba in relation to such matters. Disclosure in advance of the hearing is therefore necessary to ensure that the Defence is not disadvantaged vis-à-vis the Prosecution in terms of its ability to formulate and present its case in relation to these issues.

18. Bearing in mind the 'low burden' which applies to Defence argumentation concerning the relevance of Rule 77 disclosure,²⁰ at the very least, such correspondence was disclosable due to the fact that it provides important context as to why P-169 might have felt compelled to either contact other witnesses, or to set out his concerns in a series of letters. The Prosecution disclosed the most recent letter from P-169 pursuant to Article 67(2). The disclosure of discrete letters only provides a snapshot of the relationship between P-169 and the Prosecution.

19. When viewed in isolation, these letters lack coherency, and key contextual information and as such, their exculpatory value is undermined by the Prosecution's refusal to permit the Defence to assess them within the framework of the chronological correspondence between P-169 and the Prosecution.²¹

²⁰ ICC-02/05-03/09-501, para. 42.

²¹ *Prosecutor v. Blaskić*, Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence", 29 April 1998, para. 16: "...an established extraction of [exculpatory] evidence from its context would not, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope."

20. P-169 most recent letter refers back to previous correspondence with the Prosecution. The covering email is titled 'sms' which suggests that there may have been a series of exchanges pertaining to a sms message, addressed to or from the Prosecution.

21. The Prosecutor Senior Trial Attorney, Mr. Badibanga, also recently informed the Chamber and the Defence that P-169 had called him at the time that he was supposed to depart for The Hague for his testimony.²² According to the disclosed witness statements, Mr. Badibanga never interviewed P-169. The Prosecution has also averred that the Prosecution Operation Support Unit was responsible for liaising with witnesses in relation to security and protective measures.²³

22. It is also apparent from the most recent VWU report that the Prosecution has failed to disclose to the Defence the existence of all contacts between the Prosecution and the 21 witnesses, which are related to P-169's correspondence or any linked scheme. In particular, the report notes that last year, after having received a call from an unidentified person, [REDACTED] contacted the Prosecution, who, according to [REDACTED] informed her that "whatever this person had said to her was not true".²⁴

23. On its face, this conversation raises concerns regarding the possibility that the Prosecution may have instructed a witness (who was called as a witness of truth and who was the possible subject of a recall) as to what is and is not true. Irrespective as to whether the conversation occurred in the manner reported by [REDACTED] it would appear that the witness's reliance on the Prosecution for security and protection support has also created a relationship of dependence in relation to what is and isn't the truth.

24. Since the Chamber rejected the Defence request to either recall all 21 witnesses, or to contact them for the purposes of exploring such issues with them, disclosure of correspondence and information concerning all forms of witness assistance is the only means available to the Defence to contextualise and assess the specific nature of the witnesses' dependence on the Prosecution.

25. It is also plainly inadequate for the Defence to be compelled to rely on the VWU reports of conversations with (some of) the 21 witnesses in lieu of disclosure. VWU staff

²² Email from Mr. Badibanga, 14 October 2014 at 12.05

²³ ICC-01/05-01/08-3160-Conf-AnxA.

²⁴ ICC-01/05-01/08-3143-Conf-Exp-Anx, p. 3.

members are neutral members of the Registrar who cannot and should not perform an evidence gathering function. Their mandate is confined to issues of witness protection and security. In line with this mandate, the questions directed to the 21 witnesses were confined to this issue of security and confidentiality, rather than broader questions of potential collusion or the suborning of witness testimony.

26. In light of the above, access to the entire series of exchanges with these specific witnesses is necessary to understand the rationale for the series of demands, its escalation in terms of the ranges of addressees and the threatened consequences in the event of non-action from the side of the Court (whether it be Prosecution or VWU), and the witnesses' perception of the nature of their relationship to the Prosecution.

27. The Legal Representative for Victims has also contested the authenticity of the most recent letter from P-169, and referred to typographical errors and differences in style to substantiate her arguments. It is therefore of material importance for the Defence to assess the most recent letter in light of the entire course of correspondence between P-169 and the Prosecution in order to evaluate its consistency and correlation with any past correspondence. Disclosure is thus warranted by the Prosecutor's duty to disclose any information that could be relevant to the authenticity of previously disclosed exculpatory evidence.²⁵

(ii) An internal Prosecution memorandum does not rebut an evidential presumption that an email is received on the date it is sent

28. As a primary observation, the Prosecution's various assertions as to its communications with Witness P-169 are confusing and difficult to reconcile. Its initial position was that the only communications it had were conducted jointly with VWU.²⁶ However, it was later conceded that a private email account had been set up for the purposes of corresponding with him approximately 30 months ago and that he had continued to send emails to that address until very recently.²⁷

²⁵ *Prosecutor v. Blaškić*, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, Case No. IT-95-14-T, 30 January 1998, para. 15.

²⁶ ICC-01/05-01/08-3165-Conf-AnxC.

²⁷ ICC-01/05-01/08-3150-Conf-Red.

29. Apparently, instructions were given to the Witness to desist from writing to that address in November 2012. Somewhat curiously, however, the Prosecution continued to maintain the address until the present time, rather than take the more obvious course of closing it.

30. The assertion in the current memorandum adds a further layer of curiosity. The inbox of the email account was inspected in September, at which time P-169's communication of 5 August (sent by email on 23 August) was discovered, but apparently not the earlier email of 13 June. According to the memorandum other witnesses had ceased to use the address. If that is correct, then an inspection of the inbox would have revealed only P-169's two emails since it was last opened. Both would presumably have been readily identifiable as being both from P-169 and unopened. In those circumstances failing to discover the earlier email is inexplicable.

31. Of course circumstances could be imagined in which an inspection might not immediately have discovered the June email, namely if the inbox was so full of incoming mail from other witnesses writing to the address, that there were perhaps several pages of entries between P-169's two letters. Obviously, a simple search of the entire inbox by reference to P-169's email address would have been the minimal expedient (especially in circumstances where Senior Trial Counsel had been already forced to concede he had made misleading submissions to the Trial Chamber), but even allowing for that level of negligence, the only inference available to the Chamber is that the so-called "Hotmail" account was in regular continuous use by other witnesses between June and August 2014, contrary to what is asserted in the memorandum.

32. The memorandum thus raises rather more questions than it answers, and in the submission of the Defence the Chamber is driven, as a matter of evidence to the inevitable conclusion that P-169's email was both sent and received by the Prosecution on June 13, 2014.

33. The "mailbox rule" or presumption of effective delivery is a well-established principle in worldwide jurisdictions.²⁸ It applies just as much to email as to regular mail. No sensible evidential system could function otherwise, since proof of delivery of all mail, hard copy or electronic, would otherwise be a pre-requisite to proving effective communications.

²⁸ See e.g. *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884); United States Court of Appeals, Fourth Circuit; *Aimee NIBAGWIRE v. Alberto R. GONZALES*, Attorney General, No. 04-2254.

34. Of course the presumption is evidential and not legal and is therefore rebuttable by admissible evidence. The internal memorandum offered by the Prosecution is not admissible evidence, and its annexure to the Prosecution response as means of proof, moreover, gives rise to a concurrent wider disclosure obligation.

35. The memorandum is self-evidently not sworn testimony, nor is it a witness statement which could be admitted under any of the Court's rules.²⁹ It is not a document produced by a witness who has given sworn evidence or made a witness statement. Indeed there is no indication of authorship or acceptance of responsibility for its contents – it lacks even the basic minimal requisites of a signature or a date.

36. Its contents are, moreover, riddled with implausibility, as highlighted above, such as to render the document insufficiently persuasive to rebut the presumption that the June 13 email was received by the Prosecution on that date. Indeed the Prosecution has studiously avoided providing the corroboration necessary to substantiate the memorandum's contents. It could, for example, have left at least the word "Hotmail" unredacted on the copy of the emails said to have been sent to the address. It could have provided copies of the email exchange instructing P-169 to start and/or stop writing to the Hotmail account. It could have provided screenshots of the account's inbox showing the emails of 5 August and 13 June unopened. It did not. It offers up only a self-serving unsigned undated memo.

37. In ordinary circumstances, one cannot imagine that the Prosecution would have allowed anybody, let alone the Defence, sight of such a document, as it is an internal memorandum covered either by legal professional privilege or privilege as internal work product. The disclosure of this document as evidence of the prosecution's communications with P-169 and other witnesses by email, however, supports the Defence's applications for disclosure herein and widens their ambit.

38. It is not open to the Prosecution to briefly and partially draw aside the curtain on this email account by oblique reference through the medium of a document from a privileged file without disclosing the source to which it refers, namely the email account itself, or the context of the internal memorandum, namely the remainder of the file.

39. By disclosing this memorandum, the Prosecution has waived any privilege not just in relation to this document, but in relation to the email account itself and the whole file of

²⁹ Rule 68 of the Rules of Procedure and Evidence.

communications between the OTP and OSU concerning communications with witnesses in this case. P-169's communications via email with the OTP must be material to the preparation of the Defence to question him in his forthcoming testimony as such communications will inevitably bear upon critical issues such as whether the letter of 5 August was genuine, what the "impetus" was for his writing it, whether its contents are genuine or "entirely untruthful". The communications of other witnesses by email will have a similar bearing on those issues, in particular whether P-169's assertions about the feelings of other witnesses are truthfully expressed in his letter. The email account and the other internal memoranda will also evidence the pattern of communication with P-169.

40. Accordingly, in the Defence submission, the Trial Chamber is bound to conclude that the Prosecution has been in possession of the letter of 13 June since that date and has therefore been in breach of its disclosure obligations throughout the critical period since then.

41. Further and alternatively, the Prosecution should now be ordered to disclose to the Defence the contents of the so-called "Hotmail" account, as well as all internal memoranda concerning contact between the Prosecution and witnesses via the said account.

(iii) The impact of the Prosecution's assertion that a payment made by the Prosecution to a witness was made "on behalf of the Victims' and Witness' Unit"

42. In September 2011, P-169 received a payment of [REDACTED] This payment was for [REDACTED]

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43. This money was given to P-169 by the Prosecution.

44. In responding to the Defence's submissions on the disclosability of this payment, the Prosecution asserted that the payment was made "on behalf of the Victims' and Witnesses Unit".³¹ No other information was provided. In particular, the Prosecution gave no indication that P-169 understood, or was even informed, that the money was coming from VWU, and not from the party which had elicited his testimony in court.

³⁰ CAR-OTP-0065-0987.

³¹ ICC-01/05-01/08-3160-Conf, para. 3.

45. The Prosecution has previously overstepped the confines of its role by performing functions which were properly within the mandate of the VWU. In the *Katanga* case, through a practice of “preventive relocation” of its witnesses, the Prosecution was found to be both misusing and exceeding its mandate.³² Noting that the drafters of the Rome Statute had deliberately created a Victims and Witnesses Unit within the Registry, the Single Judge was explicit that concerning the protection of witnesses “the core role is played by the Registry and a limited mandate is given to the Prosecution.”³³ This “core role” was ascribed to the Registry given its status “as the main administrative body of the Court which is characterised by its impartiality and takes no part in the proceedings.”³⁴ Significantly, the Single Judge concluded that:³⁵

...unless the Prosecution immediately puts an end to this practice, the principle of equality of arms could be infringed and **the credibility of the relevant witnesses could be affected.**

46. The Prosecution’s assertion that it was acting as a kind of “intermediary” between VWU and P-169, and making payments on behalf of a neutral organ of the Court, appears again to take the Prosecution outside the confines of its mandate, and its role as a party to the present proceedings.

47. More significantly for the present purposes, in making payments directly to P-169, in an amount deemed sufficient to [REDACTED] necessarily impacts on the credibility of his testimony. It cannot be discounted that he believed his testimony to be linked to assistance from the Prosecution, and felt “obliged to return the favour by testifying favourably for the Prosecution”.³⁶ The question is not a budgetary one; namely from which organ of the Court the money was ultimately drawn. The question is whom did P-169 understand as being his benefactor?

48. As noted above, the Prosecution gave no indication that P-169 was told that the money was **not** coming from the Prosecution. A Prosecution staff member handed it over. There would necessarily have been a paper trail created around this payment; emails

³² ICC-01/04-01/07-428-Corr, para. 32.

³³ ICC-01/04-01/07-428-Corr, para. 28.

³⁴ ICC-01/04-01/07-428-Corr, para. 30.

³⁵ ICC-01/04-01/07-428-Corr, para. 34 (emphasis added).

³⁶ *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis’, 12 October 2011, para. 45.

between the Prosecution and VWU, authorisation from her Prosecution hierarchy to make the payment; budgetary and accounting records; notes from the Prosecution staff member physically delivered the money to P-169. Despite these associated documents being disclosable,³⁷ none have been provided to the Defence.

49. Regardless, the parties and the Chamber do have an indication of who P-169 believes was responsible for paying him. His correspondence demonstrates that indeed, he believed that it was the Prosecution who was promising and producing payments: “l’argent prévu aux témoins par le procureur de la cour pénale internationale”.³⁸ In his mind, therefore, the person handing him payments is the same person who asked him questions in court; the Prosecution. Accordingly, by making payments on behalf of VWU, the Prosecution appears to have engendered a belief in the witness that the support and assistance being provided was directly linked to the Prosecution, and his status as a Prosecution witness.

50. Accordingly, in the Defence submission, the fact that the Prosecution has paid P-169 substantial amounts of money, whether on behalf of the VWU or otherwise, provides further support for the Defence contention that the Chamber must now disregard his testimony.

(iv) The Prosecution should disclose all payments made to Prosecution witnesses “on behalf of the Victims’ and Witness’ Unit”

51. Despite having disclosed the September 2011 payment to the Defence, the Prosecution appears still to be contesting that this material falls properly under Rule 77.³⁹ The Prosecution asserts that: “all moneys paid to P-0169 fall within the scope of ordinary and legitimate witness expenses.”⁴⁰

52. As such, it is to be presumed that if the Prosecution was acting as an “intermediary” and dispensing large payments of money for subsistence of Prosecution witnesses on behalf of VWU, the Prosecution feels under no obligation to disclose these payments to the Defence.

³⁷ *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis’, 12 October 2011.

³⁸ ICC-01/05-01/08-1660-Anx1-Red2, p.2.

³⁹ ICC-01/05-01/08-3160-Conf, para. 3.

⁴⁰ ICC-01/05-01/08-3160-Conf, para. 3.

53. With respect, this cannot be the position. The potential impact on the credibility of witnesses who were receiving payments from the Prosecution (albeit on behalf of VWU) is plain. An absolutely wealth of jurisprudence requires that such payments be disclosed because of their potential to impact on the credibility of the witness in question. The *ad hoc* Tribunals were consistent in ruling that “**any** material in the possession of the Prosecution establishing that a witness requested and/or received a benefit from being a Prosecution witness may affect the credibility of the said witness and therefore should be disclosed pursuant to Rule 68” as exculpatory material.⁴¹ This Trial Chamber has confirmed the position in recent decisions.⁴² The Prosecution cannot evade its disclosure obligations on the basis that the money it was paying to its witnesses came out of VWU’s budget and not the Prosecution, particularly in the absence of any indication that the witnesses understood or were even informed of this distinction.

54. As such, the Defence requests that the Prosecution be ordered to disclose all payments made to Prosecution witnesses “on behalf of the Victims’ and Witness’ Unit”, such payments clearly falling within the scope of Rule 77.

(v) The Prosecution’s refusal to disclose communication with its witnesses has given rise to an inequality of arms which undermines the fairness of the present proceedings

55. Under oath, P-169 claimed that the time of his testimony, he had not received any money from the Prosecution.⁴³ The limited disclosure provided thus far demonstrates that that was not the case: at the very least, P-169 had received money from the Prosecution in relation to the reimbursement of his travel expenses (even for dates on which there is no recorded statement) and other expenses. Even if the amount itself would not have affected P-169’s credibility, the fact that P-169 denied receiving any funds is relevant to his credibility as a witness of truth.

⁴¹ *Prosecutor v Karadžić*, No. IT-95-5/18-T, Decision on Accused’s Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, 22 November 2011, para. 23; See also *Prosecutor v Karadžić*, No. IT-95-5/18-T, Decision on Accused’s Sixty-Fifth Disclosure Violation Motion, 12 January 2012, para. 16; *Prosecutor v Karadžić*, No. IT-95-5/18-T, Decision on Accused’s Sixty-Sixth and Sixty-Seventh Disclosure Violation Motions, 1 March 2012, para. 17; *Prosecutor v Karemera et al*, No. ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 16; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, para. 23; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Records of all Payments Made Directly or Indirectly to Witness D-18, February 2008.

⁴² See, for example, ICC-01/05-01/08-2845-Conf-Red, para. 10.

⁴³ T-138-CONF-ENG, p. 51, line 18 - p. 52, line 23.

56. The Prosecution itself considers this to be the case, and in fact made extensive submissions to this effect during *ex parte* Status Conferences.⁴⁴ In their own words, “if those transfers were innocent, the witness would have said, “Look, I was given €20 to pay for my bus fare and to have a drink” but this is not the case.”⁴⁵

57. The Prosecution clearly considers that information concerning direct transfers of funds from a party to a witness, and correspondence between the party and a witness, to be material to the preparation of this case. The Presiding Judge in this case also appears to have accepted that the parties may have a legitimate interest in obtaining specific information concerning the precise amount of money that might have been transferred from a party (or persons associated with that party) to witnesses.⁴⁶

58. Without the knowledge and consent of the Defence, the Registry also disclosed to the Prosecution information concerning payments and assistance provided to Defence witnesses.⁴⁷ These disclosures occurred with the full knowledge and implicit endorsement of the Trial Chamber, which instructed the Prosecution to seek more detailed information directly from the Registry (i.e. without judicial authorisation or oversight).⁴⁸

59. In fact, it would appear from reclassified filings on these issues that the Trial Chamber was aware that the Prosecution was in possession of the records of Western Union accounts, which allegedly contained information concerning transfers between Defence and Defence witnesses, and that the Prosecution had used such information to inform its strategy concerning the cross-examination of Defence witnesses.⁴⁹ The Trial Chamber nonetheless declined to order the Prosecution to disclose this information to the Defence (in lights of its potential relevance to the credibility of Defence witnesses).

60. Notwithstanding the protections of legal privilege in Rule 73(1), the Prosecution also requested States to grant them access to email and phone records between former members of the Defence and Defence witnesses. As a result, the Prosecution obtained unfettered and unfiltered access to the email account of Mr. Narcisse Arido.⁵⁰ The Prosecution also asserted

⁴⁴ ICC-01/05-01/08-T-303-CONF-Red-ENG.

⁴⁵ ICC-01/05-01/08-T-303-CONF-Red-ENG, p. 26, lines 21-23.

⁴⁶ ICC-01/05-01/08-T-303-CONF-Red-ENG, p.8, lines 15-20.

⁴⁷ ICC-01/05-01/08-2441, paras. 5, 8-11.

⁴⁸ ICC-01/05-01/08-2461-CONF, para. 4.

⁴⁹ ICC-01/05-01/08-T-303-CONF-Red-ENG, p. 26.

⁵⁰ ICC-01/05-01/08-3036, paras. 34, 39, 40.

that no form of privilege applied to Mr. Arido's communications, notwithstanding the possibility that they might refer to draft Defence submissions or issues pertaining to Defence strategy and investigations.⁵¹

61. Crucially, the Prosecution argued that it was "perfectly valid line of inquiry during witness examination" to question "witnesses with regard to communications they may have had with the Defence about the case".⁵²

62. If it was 'perfectly valid' for the Prosecution to both question Defence witness in relation to their communications with the Defence, and to obtain such communications, then it must also be 'perfectly valid' for the Defence to do so.

63. If the Defence had the procedural powers of the Prosecution, then it would be able to simply request States to provide the Defence with access to P169's email account and the records of all of his phone communications (and that of the other 22 witnesses). The reason why the Defence does not have such powers is that it was presumed that the Prosecutor, as an impartial Minister of Justice, would assist the Defence by collecting such information on its behalf, and disclosing it.⁵³ This power and corollary duty is an important guarantee for the principle of equality of arms at the ICC.⁵⁴

64. However, in the present circumstances, the Prosecution has exercised these powers for the sole purpose of collecting incriminating information rather than disclosing the exact same categories of information that might be exculpatory or at the very least, relevant to the Defence. Unless the Trial Chamber intervenes immediately to correct this imbalance, there can be little if any prospect for a fair and adversarial trial process.

C. REQUESTED RELIEF

65. Given the above, the Defence respectfully requests that the Chamber:

⁵¹ ICC-01/05-01/08-3058, para. 15.

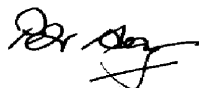
⁵² ICC-01/05-01/08-3058, para. 15.

⁵³ M. Bergsmo P. Krueger, 'Duties and Powers of the Prosecutor' page 715-725 in *Commentary on the Rome Statute of the International Criminal Court* (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at p.716 para. 2.

⁵⁴ ICC-01/04-01/07-621, para. 39; ICC-01/04-135-tENG, paras. 38-39.

GRANT the relief as set out in the “Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure.”

The whole respectfully submitted.



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The Hague, The Netherlands
16 October 2014