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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

With confidential Annexes A, B, C, D, E, F, G, H and I

**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 4 September 2014, the Prosecution disclosed what the Defence believed to be the fourth in a series of letters written by its former witness P-169 ("Letter of 5 August").¹ This Letter appeared to contain "new" information, which did not feature in his previous correspondence. P-169 claimed his testimony was the result of a "bargain" and that the 21 protected Prosecution witnesses listed in the Letter's annex, "sont prêts à apporter la preuve de subordination des témoins".² As noted by Trial Chamber III ("the Chamber"):³

in allegations **not mentioned in the previous** letters, Witness P-169 mentions "the money transferred by the ICC prosecution for the benefit of witnesses" and alleges that he has information on the "subordination" and ill-treatment of the Relevant Witnesses.

2. The Prosecution disclosed the Letter of 5 August to the Defence on 4 September 2014. Following this disclosure, the Defence wrote to the Prosecution with the following request:⁴

Dear Mr. Badibanga,

In light of recent events, we would be grateful if you could inform the Defence as a matter of urgency when the Prosecution was last in contact with P-169 or any of the other 21 witnesses listed in the annex to the Letter of 5 August, and would you confirm whether or not such contact was pursuant to judicial authorisation.

In the event that there has been contact, we would ask that the tape or video-recording of this be disclosed to the Defence forthwith.

Please ensure that any further contact is video or tape-recorded, and done in the presence of the Defence or VWU.

Kind Regards

¹ CAR-OTP-0083-1212.

² [REDACTED]

³ ICC-01/05-01/08-3154-Conf, para. 28 (emphasis added).

⁴ Email Defence to Prosecution, 12 September 2014 at 11:34 (Annex A).

Bemba Defence Team

3. No response was received. Following a further email from the Defence on 18 September 2014,⁵ the Prosecution gave the following explicit response:⁶

Dear Mr Haynes,

As indicated in several filings addressing the issue of P-169's letters, contacts with witnesses **were made jointly with the VWU following Trial Chamber III's instruction**. The VWU report issued yesterday provides an update on these contacts

Best regards
Jean-Jacques Badibanga

4. On 25 September 2014, the Prosecution filed its "Additional Information on P169's Communication on 23 August 2014." The filing was made *ex parte* to the Chamber and VWU. The Defence received a redacted version on 26 September.⁷ This filing sought to explain the basis for the incorrect assertions made by the Prosecution concerning the timing of its receipt of the Letter of 5 August.⁸ Notably, the Prosecution described previous contact it had had with P-169 by way of a non "icc-cpi-int" email address. The Prosecution made the following concessions concerning the frequency of its contact with P-169:⁹

The email address in question was used for security purposes **from April 2012 until November 2012**, to avoid P169 sending communications to an icc-cpi.int address from a public computer. On 6 November 2012, OSU decided to suspend its use of the email address [REDACTED] due to security policies, and OSU informed P169 of the decision on the same day. On 6 November 2012, P169 was provided with adequate alternate means to communicate securely with the Prosecution. **Since then P169 used the new communication means to contact the OSU and only a few times made resort to the old email address.**

⁵ Email Defence to Prosecution, 18 September 2014 at 15:15 (Annex B).

⁶ Email Prosecution to Defence, 19 September 2014 at 10:02 (Annex C) (emphasis added).

⁷ ICC-01/05-01/08-3150-Conf-Red.

⁸ ICC-01/05-01/08-3150-Conf-Red, paras. 2-3.

⁹ ICC-01/05-01/08-3150-Conf-Red, para. 4.

5. On 30 September 2014, the Defence wrote to the Prosecution, noting the apparent inconsistency between the Prosecution Senior Trial Attorney's assertions to the Defence that contact had been made "jointly with VWU", and its filing before the Trial Chamber detailing numerous instances of contact directly with P-169 dating back to April 2012. The Defence noted:¹⁰

As such, there appear to have been numerous occasions of contact between the Prosecution and P-169, and apparently not conducted jointly with VWU pursuant to Trial Chamber III's instruction. We would be grateful for the immediate disclosure of all email and other written exchanges with P-169, and any other video or audio recordings, minutes and/or notes of your conversations with him, whether in the presence of VWU or otherwise.

6. On 2 October 2014, the Prosecution informed the Defence that it was undertaking a "review of materials in its possession".¹¹ A further email from the Defence, requesting that disclosure be provided by 3 October went unanswered.¹² A follow-up email on 6 October 2014 also produced no response.¹³

7. On 7 October 2014, the Defence received disclosure of 27 documents pursuant to Rule 77 of the Rules of Procedure and Evidence ("7 October Disclosure"). This disclosure included a previously undisclosed letter from P-169 to the Prosecution dated 11 June 2014 ("Letter of 11 June").¹⁴ No covering email was disclosed. The Letter of 11 June contains much of the same language as the Letter of 5 August, including allegations concerning the subornation of witnesses, and the reconsideration of P-169's testimony. No explanation was given for its non-disclosure.

¹⁰ Email Defence to Prosecution, 30 September 2014 at 10:40 (Annex D).

¹¹ Email Prosecution to Defence, 2 October 2014 at 12:35 (Annex E).

¹² Email Defence to Prosecution, 2 October 2014 at 17:28 (Annex F).

¹³ Email Defence to Prosecution, 6 October 2014 at 13:34 (Annex G).

¹⁴ CAR-OTP-0083-1304.

8. On 7 October 2014, the Defence wrote to the Prosecution asking when the Letter of 11 June came into its possession, and asking for disclosure of the covering email.¹⁵ No response has been received to what is, with respect, a very simple question. However, the chain of custody in ringtail shows the letter coming into the custody of OTP-OSU on 13 June 2014.

9. Concerning the claim by P-169 that his testimony was as the result of a “bargain” and that the 21 protected Prosecution witnesses listed in the Letter’s annex, “sont prêts à apporter la preuve de subordination des témoins”,¹⁶ on 2 October 2014, the Defence asked the Prosecution to disclose payments or any other benefits that the Prosecution had made to these witnesses.¹⁷ A follow-up email was sent on 6 October.¹⁸ No response has been received. However, the 7 October Disclosure contains materials detailing payments made by the Prosecution to P-169 following the completion of his testimony, notably one payment in the amount of

[REDACTED]

10. As a result of the Prosecution’s ongoing non-disclosure, and disclosure violations discussed in more detail in the present motion, the Defence accordingly asks that the Chamber order the Prosecution to disclose all materials related to contact with P-169 and the 21 witnesses, payments to P-169 and the 21 witnesses, and seeks the remedies and sanctions for non-disclosure as set out below.

C. APPLICABLE LAW

11. The accused has a right to: (i) have adequate time and facilities for the preparation of the defence (Article 67(1)(b) of the Statute); and (ii) have access to information that “may affect the credibility of prosecution evidence” (Article 67(2)

¹⁵ Email Defence to Prosecution, 7 October 2014 at 17:59 (Annex I).

¹⁶ [REDACTED]

[REDACTED]

¹⁷ Email Defence to Prosecution, 2 October 2014 at 13:40 (Annex H).

¹⁸ Annex G.

of the Statute) or that is “material to the preparation of the defence” (Rule 77 of the Rules).

12. The Appeals Chamber has held that the concept of information “material to the preparation of the defence” needs to be interpreted broadly so as to include documents that were not directly linked to exonerating or incriminating evidence.¹⁹ Indeed, the Appeals Chamber has found that the defence need only establish *prima facie* relevance:²⁰

a low burden [is placed] on the defence. It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a *prima facie* assessment.

13. This Trial Chamber has previously held that material relevant to P-169’s claims concerning payments linked to testimony should be disclosed under Rule 77 of the Rules:²¹

In the case at hand, the Chamber notes that the Prosecution Submissions refer to allegations made by Witness 169 as to “outstanding claims” and “money promised by the Prosecutor for witnesses”. In the view of the Chamber, any information relating to such claims may be “material for the preparation of the defence” and therefore should be disclosed under Rule 77 of the Rules.

¹⁹ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paras. 77 to 78; ICC-01/04-01/06-1433, para. 77; Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501, para. 38.

²⁰ ICC-02/05-03/09-501, para. 42.

²¹ ICC-01/05-01/08-2845-Conf-Red, para. 10.

D. SUBMISSIONS

(a) The Prosecution is in breach of its disclosure obligations

14. The Defence has previously asked the Prosecution to disclose payments made by the Prosecution to P-169, and to the 21 witnesses listed in his letters of 7 June, 8 June and 5 August.²² The Prosecution's response is worth noting in full:²³

13. The Defence requests for disclosure of information regarding benefits and payments to Prosecution witnesses and of materials generated from contacts with Witness 169 and 178 and the exposed witnesses, are also without merit.

14. The Chamber, in the section of its Decision concerning disclosure, referred to allegations made by Witness 169 as to "outstanding claims" and "money promised by the Prosecutor for witnesses". The Chamber ruled that "any information relating to such claims may be material for the preparation of the defence and therefore should be disclosed under Rule 77 of the Rules".

15. The Prosecution submits that it has already complied with the Chamber's above-mentioned directions by providing the Defence with the redacted version of its Prosecutions Submissions and the two annexes.

16. Any reimbursement by the Prosecution to witnesses of expenses that **do not go "beyond the ordinary requirements of subsistence", such as transportation and meals**, does not have the potential to affect witnesses' credibility. This type of information does not therefore qualify as information subject to disclosure.

17. Any request for benefits and/ or payments going beyond the reimbursement of ordinary expenses, potentially affecting the witnesses' credibility, and any related contact between Prosecution witnesses and the Court in the instant case **has involved the VWU and has been submitted to the VWU that deals with these matters as part of its mandate**. The Prosecution therefore submits that any request for disclosure of such information should be addressed to the VWU and not to the Prosecution.

²² CAR-OTP-0072-0504_R01/ EVD-T-D04-00057; CAR-OTP-0072-0508_R01/ EVD-T-D04-00056; CAR-OTP-0083-1212.

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

15. The 7 October Disclosure contains numerous documents concerning payments made by the Prosecution to P-169. The Prosecution has not disclosed payments to any other witnesses. Concerning P-169, in one month – September 2011 – following the completion of P-169’s evidence on 11 July 2011,²⁴ the Prosecution made a payment to P-169 in the amount of [REDACTED]. The payment form is an internal document from the Office of the Prosecutor, and not VWU. The form includes a space to write “name of OTP staff member/representative making payments”. The payment breakdown was for:²⁵

[REDACTED]

16. This is not a reimbursement for food or transport associated with his testimony. This is a payment to a Prosecution witness, directly from the Prosecution, which “goes beyond the ordinary requirements of subsistence.”²⁶ It is not an “ordinary expense”.²⁷ No other disclosure in relation to P-178 or any of the 21 witnesses was provided. The Defence submits that this payment cannot be reconciled with the Prosecution’s earlier statement that:²⁸

Any request for benefits and/ or payments going beyond the reimbursement of ordinary expenses, potentially affecting the witnesses’ credibility, and any related contact between Prosecution witnesses and the Court in the instant case has involved the VWU and has been submitted to the VWU that deals with these matters as part of its mandate.

17. The documents concerning these payments were disclosable at the time of their creation. Disclosure under Rule 77 must take place immediately after the Prosecution has identified an item as coming within this rule, and should be done

²⁴ ICC-01/05-01/08-T-142-Red-ENG.

²⁵ CAR-OTP-0065-0987.

²⁶ ICC-01/05-01/08-2897-Conf, para. 16.

²⁷ ICC-01/05-01/08-2897-Conf, para. 17.

²⁸ ICC-01/05-01/08-2897-Conf, para. 17.

on a continuous basis.²⁹ The Prosecution should not wait for a request from the Defence. It must comply with its obligations regardless.³⁰ By failing to disclose this material before the specter of P-169's testimony loomed, the Prosecution has breached its disclosure obligations under Rule 77.

18. This violation has caused prejudice to the Accused. Had this material been disclosed in a timely manner, it would have given important context to the allegations made in the 7 June and 8 June Letters from P-169, and undoubtedly have formed part of the Defence submissions (and the Chamber's deliberations) on these letters in November 2013.³¹ As it was, the Defence was making submissions in the dark, while the Prosecution was in full knowledge that it indeed had been paying P-169 over and above the "ordinary" payments needed to reimburse taxis or pay for his lunch. Moreover, Mr. Bemba was deprived of seeking the admission of these payments during the evidential phase of the case, and then making submissions on their effect on the credibility of P-169 in his Closing Brief.

19. Similarly, the Prosecution is also in breach of its disclosure obligations by failing to disclose the Letter of 11 June. Following the Trial Chamber's ruling in November 2013 regarding the disclosure of P-169's previous letters,³² the Prosecution could have been in no doubt as to its obligation to disclose this letter to the Defence. The ringtail chain of custody states that the "OTP-OSU" has been in possession of the letter since 13 June 2014. The Defence is not in a position to make submissions as to what the "OSU" is or does, but notes the established jurisprudence that the Office of the Prosecutor is treated as a single unit for the purpose of discharging its disclosure obligations.³³ If the Prosecution has created

²⁹ ICC-01/09-01/11-62, para. 21.

³⁰ ICC-02/05-03/09-501, para. 34.

³¹ ICC-01/05-01/08-2872-Conf and ICC-01/05-01/08-2924-Conf.

³² ICC-01/05-01/08-2845-Conf-Red, paras. 10-11.

³³ *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Judgement, 30 September 2011, para. 155; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006,

secret email accounts for the purposes of communicating with its witnesses,³⁴ it has a duty to act diligently in relation to monitoring these email accounts. Nor, as held in the *Kenyatta* case, can a lack of organisation or coordination within the Office of the Prosecutor be raised as an excuse to a failure to disclose.³⁵

20. Moreover, even on 7 October, when the Letter of 11 June was finally disclosed to the Defence, the Prosecution withheld the covering email, despite knowing that this was disclosable.³⁶ A direct request for the covering email went unanswered.³⁷ The Prosecution's failure to disclose the Letter of 11 June, again, before the Trial Chamber ordered the recall of P-169 puts the Prosecution in breach of its disclosure obligations under Rule 77 of the Rules. This violation has caused prejudice to the Accused, depriving him of the ability to seek recall of P-169 at an earlier stage, make further submissions on the effect of P-169's statements on the credibility of his evidence in his Closing Brief, and investigate and explore the revelations contained in the Letter of 11 June as to the subornation of the entirety of the Prosecution's list of [REDACTED] witnesses.

21. There are numerous remedies available for Prosecutorial non-disclosure of this significance, including recall of the witnesses involved,³⁸ drawing evidential inferences in favour of the accused;³⁹ and the exclusion of the witness' testimony.⁴⁰

fn. 33, citing *The Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 42-46.

³⁴ ICC-01/05-01/08-3150-Conf-Red, paras. 3-4.

³⁵ ICC-01/09-02/11-728, para. 97.

³⁶ ICC-01/05-01/08-3154-Conf, para. 34.

³⁷ Annex I.

³⁸ *Prosecutor v. Delić*, No. IT-04-83-T, Decision on Urgent Defence Motion Concerning Rule 68 Compliance by the Prosecution, 28 March 2008; *Prosecutor v. Lukić & Lukić*, No. IT-98-32/1-T, Decision on Milan Lukić's Motion to Suppress Testimony for Failure of Timely Disclosure, 3 November 2008 at para. 18.

³⁹ *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Judgement, 30 September 2011, para. 176.

⁴⁰ *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, Decision on Defence motions Alleging Violation of the Prosecutor's Disclosure obligations Pursuant to Rule 68, 22 September 2008, para. 61; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, "Ruling on Disclosure Regarding Witness TF 1-195", 4 February 2005, para. 7; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TFI-141.

The Defence has previously submitted that sufficient grounds exist for the Trial Chamber not to rely on the evidence of P-169 for any incriminating findings of fact against Mr. Bemba.⁴¹ The Chamber has deferred its decision on this request.⁴² In the Defence submission, the non-disclosure of payments to this witness which have the potential to affect his credibility, and the non-disclosure of correspondence in which he evinces an intention to “re-consider” his testimony, make an even stronger case for the Chamber declining to rely on his testimony, as a remedy for the prejudice suffered as a result of the Prosecution’s non-disclosure.

22. Finally, the Defence notes that the Prosecution before the *ad hoc* Tribunals has been sanctioned for failing to disclose exculpatory material, or material which would have allowed the Defence to challenge the credibility of a Prosecution witness.⁴³ The Prosecution has also recently been reprimanded in the *Kenyatta* case for failing to identify and produce disclosable material to the Defence.⁴⁴ The materials in the present case are patently disclosable. Similar documents have been characterised as such by the Chamber, in recent decisions. The materials were subject to previous requests for disclosure from the Defence, with the Prosecution responding in a manner which cannot be reconciled with the material in its possession. In these circumstances, and in order to safeguard Mr. Bemba’s right to a fair trial,⁴⁵ the Defence submits that it is appropriate for the Chamber to reprimand to the Prosecution for its repeated failures disclose material falling within its statutory disclosure obligations.⁴⁶

⁴¹ ICC-01/05-01/08-3139-Conf, paras. 2, 9 and 12.

⁴² ICC-01/05-01/08-3154-Conf, para. 50(vi).

⁴³ *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution, 19 October 2006, para. 17; *Prosecutor v. Ndindiliyimana et al.*, No. ICTR-00-56-T, Decision on Defence motions Alleging Violation of the Prosecutors’ Disclosure obligations Pursuant to Rule 68, 22 September 2008; *Prosecutor v. Furundzija*, No. IT-95-17/1-PT, ‘The Trial Chamber’s formal complaint to the Prosecutor Concerning the Conduct of the Prosecution’, 5 June 1998.

⁴⁴ ICC-01/09-02/11-728, para. 89.

⁴⁵ ICC-01/09-02/11-728, para. 89 citing ICC-01/04-01/06-1401, para. 92: “disclosure of exculpatory material in the possession of the prosecution is a fundamental aspect of the accused’s right to a fair trial”.

⁴⁶ ICC-01/09-02/11-728, para. 89.

23. Moreover, given these violations, the Defence also requests that the Prosecution be ordered to conduct a review of its casefile and certify to the Chamber that all disclosable material has been provided to the Defence.⁴⁷ Although extremely late in the day, the Prosecution's disclosure obligations are ongoing, and Mr. Bemba's position must be protected in the event of any appeal. The non-disclosure of such important materials in the present case, despite previous Defence requests, warrants an order of this kind in the present case.

(b) Contact between the Prosecution and its witnesses

24. The Defence is now aware that the Prosecution has been in what appears to be regular contact with P-169, through both a non "icc-cpi-int" email address, and then later through an official ICC address.⁴⁸ In line with the practice of the Court, the Prosecution was aware that post-testimonial contact was required to be audio or video-recorded.⁴⁹

25. Moreover, the Trial Chamber and the Prosecution have taken the view that communications between P-169 and the Prosecution (or other third parties) that concern payments or benefits promised, received, or expected are disclosable to the Defence.⁵⁰ In fact, the Prosecution disclosed the Letter of 5 August and the Letter of 11 June as exculpatory material under Rule 77.

26. In the case of P-169, the Defence submits that all communications from this witness of which the Prosecution was a recipient, or which are in the Prosecution's

⁴⁷ ICC-01/09-02/11-728, para. 97.

⁴⁸ ICC-01/05-01/08-3150-Conf-Red, para. 4.

⁴⁹ ICC-01/04-01/06-2192-Red, para. 66.

⁵⁰ ICC-01/05-01/08-2845-Conf-Red, paras. 10-11; Letter Prosecution to Defence, "040914 – Pexo Disclosure"; Letter Prosecution to Defence "Disclosure of evidence falling under Rule 77 of the Rules of Procedure and Evidence and under Article 67(2) of the Rome Statute".

possession, are material to the preparation of the defence. The Trial Chamber has ordered the re-call of this witness on the following basis:⁵¹

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.

27. The Chamber has permitted his examination on "issues arising out of Witness P-169's various allegations and issues of witness credibility."⁵² The Defence will only be in a position to question the witness on his "various allegations" and "credibility" once in possession of all communications in the possession of the Prosecution which demonstrate the tone, frequency, and content of P-169's missives, as well as the content of any responses.

28. This is particularly so given that the Legal Representative of Victims has challenged the authenticity of the Letter of 5 August.⁵³ The Defence will only be in a possession to explore the authenticity of the Letter of 5 August after having a full picture of the way in which this witness has previously communicated. The Defence notes that the Appeals Chamber has held that the concept of information "material to the preparation of the defence" needs to be interpreted broadly so as to include documents that were not directly linked to exonerating or incriminating evidence.⁵⁴ Communications between the Prosecution and a witness who has made

⁵¹ ICC-01/05-01/08-3154-Conf, para. 29.

⁵² ICC-01/05-01/08-3154-Conf, para. 31.

⁵³ ICC-01/05-01/08-3145-Conf-Corr.

⁵⁴ Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paras. 77 to 78; ICC-01/04-01/06-1433, para. 77; Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 38.

allegations of subornation and who wishes to “re-consider” his testimony are surely material to any Defence preparation in advance of his recall. As such, the Defence requests that the Prosecution be ordered to disclose all email and other written exchanges with P-169, and any other video or audio recordings, minutes and/or notes of the Prosecution’s conversations with P-169, whether in the presence of VWU or otherwise.

29. Moreover, the Defence submits that all post-testimony contact with any of the 21 witnesses listed in the annex to the Letter of 5 August is also disclosable. The Prosecution has known since June 2012 that there are live issues in the present proceedings concerning the credibility of these 21 witnesses.⁵⁵ The Prosecution was required to audio or video-record any subsequent contact with them. The Prosecution’s “Additional Submissions” demonstrate that the Prosecution team in the present proceedings have engaged in post-testimonial contact with at least one Prosecution witness, either via official ICC email addresses or otherwise, apparently in the absence of VWU.

30. In such circumstances, the Prosecution should be ordered to disclose all email and other written exchanges with any of the 21 witnesses listed in the annex to the Letter of 5 August, and any other video or audio recordings, minutes and/or notes of the Prosecution’s conversations with these witnesses, whether in the presence of VWU or otherwise. This material is relevant to the preparation of the Defence examination of P-169, given his claims concerning contact with these witnesses. It will also assist the Chamber in its ongoing search to determine how, in fact, an accurate list of 21 protected Prosecution witnesses was compiled in breach of the witness protective orders issued in the present case, as well as in its assessment of the overall credibility of the Prosecution’s crime-base case.

⁵⁵ ICC-01/05-01/08-2827-Conf.

(c) Payments by the Prosecution to its witnesses

31. In response to a previous Defence request for disclosure of all payments or benefits made by the Prosecution to P-169 and the 21 witnesses he identifies,⁵⁶ the Prosecution asserted that the payments in question “do not go beyond the ordinary requirements of subsistence”⁵⁷ and as such are not disclosable. The 7 October Disclosure indicates that this is not the case.

32. In any event, even if the payments to the remaining 21 witnesses are merely “ordinary” payments (unlike the September 2011 payment to P-169), these payments should now properly be disclosed. P-169 has asserted that these witnesses are ready to bring evidence that their testimony was suborned. In these circumstances, the payments to the 21 Prosecution witnesses concerned - even if merely “ordinary” - are material to the preparation of the Defence, as they will assist in the Defence preparation of P-169’s examination and will play an important role in the testing of his credibility. There is no basis upon which they should be withheld from the Defence given their significance to Defence preparation and the gravity of the allegations made in the Letter of 5 August.

(d) Expedited Ruling

33. The testimony of P-169 is scheduled to commence on 14 October 2014, five days from the date of the present filing.⁵⁸ The Defence has acted with all due diligence in bringing this matter before the Chamber, having received the 7 October Disclosure less than 48 hours ago. The Defence has also been active in following-up disclosure requests with the Prosecution and attempting to set deadlines for compliance.

⁵⁶ ICC-01/05-01/08-2872-Conf.

⁵⁷ ICC-01/05-01/08-2897-Conf

⁵⁸ ICC-01/05-01/08-3154-Conf, para. 23.

34. Moreover, the Defence undertakes to review any subsequent disclosure and seek relevant instructions within the briefest possible period. Regardless, the Defence is compelled to ask for an expedited ruling from the Trial Chamber and, if necessary, an adjournment of the testimony of P-169 to allow it to review any disclosure forthcoming as a result of the Chamber's decision.

D. RELIEF REQUESTED

35. In light of all of the above, the Defence requests that the Chamber:

ORDER the Prosecution to disclose immediately the covering email of the Letter of 11 June;

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

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

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

REPRIMAND the Prosecution for its failure to comply with its disclosure obligations in the present case;

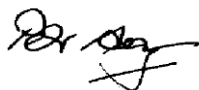
GRANT the Defence request for the Chamber not to rely on the testimony of P-169 for an incriminating finding of facts against Mr. Bemba;

ORDER the Prosecution to conduct a review of its casefile and certify before the Chamber that all disclosable material has been provided to the Defence;

ORDER the abridgement of the time for any Prosecution response to the present request; and

DELIVER an expedited ruling on the present request, and/or
ORDER an adjournment the testimony of P-169 accordingly.

The whole respectfully submitted.



Peter Haynes QC
Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands
9 October 2014