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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 and B

Defence Urgent Submissions on the 5 August Letter

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. INTRODUCTION

1. This urgent motion is brought before the Trial Chamber following the disclosure by the Prosecution on 4 September 2014 of exculpatory material in the current case.

2. The material is of quintessential relevance to issues before the Chamber, significantly undermines the Prosecution case, and renders any reliance upon witness P-169 impossible. It also brings further into question the credibility of 21 of the Prosecution's crime-base witnesses. In the Defence submission, it is inconceivable that the Trial Chamber should continue to judgment without having regard to this material, notwithstanding the technical closure of the evidence. If the interests of justice demand the suspension of filing timetables and/or the hearing of oral submissions to permit further investigations, or the reception of further evidence, then the Chamber must take that course. Any expedient compromise solution can only be entertained on the basis that the accused is accorded the fullest benefit of any doubt in relation to the effect of the material. Simply pretending the material does not exist or is not significant in weighing the evidence cannot be an option.

3. The material concerned is the latest in a series of letters from Prosecution witness, P-169. The Trial Chamber is aware of the history of correspondence between P-169 and the Court which - as far as the Defence is aware - dates back to 6 August 2011.¹ The content of that correspondence is the subject of detailed submissions in Mr. Bemba's Closing Brief,² though unsurprisingly, the Prosecution does not deal with it.

¹ ICC-01/05-01/08-1727-Conf.

² Defence Closing Brief, paras. 193-224.

4. In fact, the Prosecution's Closing Brief was remarkable for the Prosecution's unqualified reliance on its own witnesses, including P-169. The Prosecution relied unreservedly on P-169 despite the fact that his previous conduct was considered by VWU as "grave", and he had:³

[REDACTED]

5. On 4 September 2014, the Prosecution disclosed to the Defence a fourth letter written by P-169.⁴ The letter is dated 5 August 2014, and is (again) intended for

[REDACTED].⁵ Notably, P-169 copied [REDACTED]
[REDACTED]

6. The Letter of 5 August goes further than those previously received. It again confirms the existence of contacts between Prosecution witnesses on matters pertaining to their testimony.⁶ However, P-169 unequivocally characterises his testimony as being the result of a bargain, and evinces an intention to "reconsidérer mon témoignage". Crucially, he also refers to the 21 protected Prosecution

³ ICC-01/05-01/08-2975-Conf-Red, para. 8, citing to: ICC-01/05-01/08-2827-Conf-Red-AnxA, page 4, where the Witness wrote the following : "[REDACTED]"

[REDACTED]

⁴ CAR-OTP-0083-1212 ("Letter of 5 August").

⁵ The letter is addressed to [REDACTED]
copied to [REDACTED]

[REDACTED]

⁶ Letter of 5 August: [REDACTED]

[REDACTED]

witnesses who are listed in the letter's annex,⁷ and states that "[i]ls sont prêts à apporter la preuve de subordination des témoins".

7. Mr. Bemba's Closing Brief was due on 25 August 2014. It is difficult to imagine a document of more relevance to the Defence submissions on the credibility of the Prosecution case, than a letter in which a Prosecution witness speaks of proof that the entirety of the Prosecution's crime-base evidence was suborned.

8. P-169 has previously corresponded with the Prosecution via email. His letter of 7 June 2013 was sent via email on the same date,⁸ his letter of 8 June 2013 was sent two days later on 10 June.⁹ Unlike previous disclosures, the Prosecution did not provide the Defence with the covering email, or give any indication of the date of receipt. It was only disclosed to the Defence a month after it was written, and after the expiry of the deadline for Mr. Bemba's Closing Brief.

B. SUBMISSIONS

(a) The impact of this document on the evidential record of the case

(i) *P-169 and the 21 witnesses can no longer support incriminating findings against the accused*

9. It is not an exaggeration to state that the Prosecution has put P-169 at the centre of its case. He is a lynchpin; relied upon unreservedly, and without qualification in the Prosecution Closing Brief to support submissions concerning

⁷ [REDACTED]

⁸ ICC-01/05-01/08-2827-Conf-Red-AnxA.

⁹ ICC-01/05-01/08-2827-Conf-Red-AnxB.

crimes allegedly committed by MLC troops,¹⁰ command responsibility,¹¹ the movement of troops,¹² and contextual elements.¹³ His testimony is relied upon to support 83 separate propositions in Prosecution's Closing Brief,¹⁴ and on 45 occasions his testimony is the only evidence cited.¹⁵ He is the only witness relied upon to allege that Mr. Bemba gave an order to "balayer" Mongoumba; a fanciful story that features more than once in the Prosecution Closing Brief.¹⁶

10. The Defence's position concerning P-169's reliability is clear.¹⁷ For numerous reasons (even putting aside the [REDACTED] euros he has already received as a result of having testified),¹⁸ he is not someone upon whom the Chamber can safely rely. VWU appears to take the same view of his general credibility.¹⁹

11. In the Letter of 5 August, P-169 has evinced an intention to reconsider his evidence; evidence around which the Prosecution has centered its case. He further states that 21 other witnesses, including P-178, are ready to bring evidence of subornation of witnesses. Put simply, the Letter of 5 August suggests that [REDACTED] upon whom the Prosecution rely to assert that crimes were committed by MLC troops in the Central African Republic,²⁰ are ready

¹⁰ Prosecution Closing Brief, fn. 175, [REDACTED] 209, 301, 303, 310, 311, 319, 426, 1664, 1665, 1666-1668, 1675-1681, 1994.

¹¹ Prosecution Closing Brief, fn. 26, 80, 461-462, 471, 1667, 2206-2209.

¹² Prosecution Closing Brief, fn. 62, 74, 209, 298, 402, 420, 424, 426, 1675, 1679.

¹³ Prosecution Closing Brief, fn. 1190, 1194.

¹⁴ Prosecution Closing Brief, fn. 26, 28, 42-43, 62, 66-68, 74, 80, 104-105, 107-108, 175, [REDACTED] 187-188, 209-210, 215, 227, 232, 298, 301, 303-304, 310-311, 317, 319, 324, 342, 345-346, 371, 379, 399, 402, 405, 420, 424, 426, 461-462, 471, 602, 732, 878-879, 881, 943, 1190, 1156, 1662, 1664-1668, 1675-1681, 1815, 1819, 1823, 1828-1829, 1848, 1853-1854, 1881, 1902, 1944, 2206-2209.

¹⁵ Prosecution Closing Brief, fn. 26, 62, 80, 175, [REDACTED] 187-188, 209, 298, 301, 303-304, 310-311, 319, 402, 420, 426, 461-462, 471, 602, 1190, 1664-1668, 1675-1681, 1823, 1829, 1848, 1944, 2206-2209.

¹⁶ Prosecution Closing Brief, fn. 1664-1665, 1667, 2206-2209.

¹⁷ ICC-01/05-01/08-3121-Conf, paras. 104-116.

¹⁸ EVD-T-D04-00057/CAR-OTP-0072-0504_R01.

¹⁹ ICC-01/05-01/08-148-Conf-Red2, page 12. See also ICC-01/05-01/08-2912-Conf-AnxD: [REDACTED]

[REDACTED]

²⁰ [REDACTED]

to bring proof that they gave false testimony following the receipt of some material benefit.

12. Despite the late stage of the proceedings, these are not allegations which can simply be ignored, or brushed under the carpet. This letter throws further doubt on the Prosecution's insistence that it has established beyond reasonable doubt that the MLC troops committed crimes in the Central African Republic;²¹ a basic prerequisite to any conviction of the accused. The question therefore arises; what next steps should the parties and the Trial Chamber take, given the seriousness of these allegations, their wide-ranging implications, and the current stage of the proceedings.

13. On 9 September, the Defence wrote to the Prosecutor of the International Criminal Court in the following terms:²²

In the light of the contents of the disclosure, we invite you to state whether... the Prosecution continues to rely upon witness P-169, in particular, and/or the witnesses referred to in his letter as witnesses of truth. If not, whether the Prosecution intends to re-file its Final Trial Brief deleting all references to the aforesaid witness(es), or to deal with the matter in its Reply. If so, upon what basis is reliance maintained?

14. Given the late stage of the proceedings and the tight timetable for the filing of briefs and the presentation of oral arguments, the Defence insisted on a response by close of business the same day, 9 September 2014.

15. The Prosecution took an additional 24 hours to respond, replying only late in the afternoon of 10 September 2014.²³ The response came from the Senior Trial

²¹ Prosecution Closing Brief, paras. 174, 348, 457, 498, 506.

²² See Annex A.

²³ See Annex B.

Attorney in the present case. After two days of reflection, the Prosecution's considered response was as follows:²⁴

The Prosecution intends to continue to rely upon witness P-169 and the witnesses referred to in P-169's letter. Finally, the Prosecution strongly objects to the contents of P-169's letter **as it is entirely untruthful**.

16. The Prosecution's position is quixotic. It has disclosed the Letter of 5 August as exculpatory material, accordingly, it must be taken to accept that it undermines the credibility of one or more of its witnesses.

17. The statement that the Letter of 5 August is "**entirely** untruthful" is a careless one. Is the Prosecution now disputing that P-169 was a witness? Or that he wa [REDACTED]? Or that he has received money as a result of his testimony? Is the letter really untruthful in its entirety? Or only those parts which do not fit with the Prosecution case? The Defence invites the Prosecution to clarify this statement in any subsequent response. Nor has the Prosecution disclosed or explained the basis of this assertion that the letter is "**entirely** untruthful". If the Prosecution has investigated the matter, than the details of this investigation are relevant and should be disclosed to the Defence and shared with the Trial Chamber. If the Prosecution has not, then this assessment must be based on the Prosecution's knowledge to date of P-169's character and reliability. Namely, that he is a person incapable of belief. In such circumstances, the Prosecution cannot continue its unqualified reliance on the testimony of this witness, regardless of how important they view him as being to their case.

18. More significantly, the Prosecution has statutory and ethical duties act as a minister of justice to search for the truth and to make justifiable submissions on

²⁴ See Annex B (emphasis added).

credible evidence. In other ICC cases, both the Prosecution²⁵ and the Legal Representative of Victims²⁶ have withdrawn their reliance on witnesses who are no longer deemed reliable.²⁷ This was also common practice at the ICTY²⁸ and ICTR.²⁹ At the STL, suspects have been released from detention on the basis of Prosecution witnesses no longer being deemed reliable.³⁰ On each of these occasions, the prosecutors in question put their statutory and ethical duties above their determination to ensure a conviction. Prosecutors appearing before the ICC have “both a legal and ethical obligation to make all reasonable efforts to ensure that the evidence it presents is reliable.”³¹

19. When faced with witnesses threatening to change their testimony in exchange for financial gain, Trial Chamber V of the ICC has confirmed the obvious, namely:³²

that it is entirely unacceptable for any person to inappropriately manipulate the testimony of the Court's witnesses. Such behaviour will render the affected testimony unreliable or inadmissible.

20. In the Defence submission, given the Prosecution's insistence that the credibility of these witnesses is not affected, 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. These submissions stand against the

²⁵ ICC-01/04-01/07-2731, Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011.

²⁶ ICC-01/04-01/07-2699-Red, Décision relative à la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal, 11 février 2011.

²⁷ ICC-01/04-01/07-T-182-Red-ENG CT WT, pages 2-3.

²⁸ *Prosecutor v. Tadić*, Trial Chamber's Decision on Prosecution Motion to Withdraw Protective Measures for Witness L", Case No. IT-94-1, 5 December 1996.

²⁹ *Prosecutor v. GAA*, Judgment and Sentence, Case No. ICTR-07-90-R77-I, 4 December 2007, para. 11: “The Chamber further considers the view that as a general principle the culpability of the person who induced the offence is greater than that of the person who was induced.”

³⁰ Special Tribunal for Lebanon, Submission of the Prosecutor to the Pre-Trial Judge under Rule 17 of the Rules of Procedure and Evidence, CH/PTJ/2009/004, 27 April 2009.

³¹ ICC-01/04-01/07-3436-AnXI, para. 141.

³² ICC-01/09-02/11-868-Red, para. 35.

backdrop of the Defence having abandoned any of its witnesses over whom a question-mark had been raised concerning credibility, in an “approach [that] is designed to protect the integrity of these proceedings”.³³

21. Given the Prosecution’s insistence on keeping these witnesses in play (despite giving no indication that P-169’s latest claims have been investigated or explored with any of the witnesses in question) the Defence submits that the Chamber is now required to take measures to ensure that the fairness of these proceedings is beyond reproach, and its judgment is not open to challenge. In the Defence submission, the only course remaining is for Trial Chamber to decline to rely on the testimony of P-169 and the 21 witnesses implicated in the Letter of 5 August to support any incriminating finding against the accused. An indication from the Chamber at this stage that the testimony of these witnesses is not considered reliable would obviate the need for the Defence to take further investigative steps and potentially seek to recall P-169 and other witnesses, measures which are discussed directly below.

(ii) Recall of the witnesses implicated in the Letter of 5 August

22. Of course, the question-mark hanging over P-169 and the 21 witnesses could be erased (or indelibly inked), through the process of their recall. Should the Trial Chamber decline to indicate that the testimony of P-169 and the 21 witnesses is no longer reliable, the Defence signals its intention to interview P-169 in order to explore his statement concerning the reconsideration of his testimony, and the “proof” which the other 22 witnesses are ready to bring concerning the fact of their “subornation”.

23. There is no property in a witness. In its decision of 22 May 2014, the Trial Chamber recognised that the Protocol concerning contacts between witnesses and

³³ Defence Closing Brief, paras. 14-16.

parties does not apply to possible post-testimony contact; the only issue at stake at such a juncture is whether such contact would engender a security risk, which should be assessed by VWU and a competent Chamber.³⁴

24. The Prosecution disclosed the Letter of 5 August pursuant to Article 67(2) of the Statute. It is therefore apparent that the Prosecution does not (or at least, not at this juncture) contest the fact that such information exculpates Mr. Bemba or undermines the reliability and credibility of the Prosecution case.

25. The jurisprudence of the ICC as concerns exculpatory evidence and related investigations is clear: there is no cut-off for such matters.³⁵ The right of the Defence to receive exculpatory evidence, and to conduct related investigations continues throughout the proceedings, including the appeal stage.³⁶ The right to expeditious proceedings cannot be employed to oppose the right to fair proceedings, which hinges on the ability of the Defence to obtain and make use of exculpatory information.

26. It therefore follows that the Defence must have the right to investigate exculpatory issues at any stage of the proceedings. Even putting the trial phase aside, the Defence could still request the admission of additional evidence from P-169 either on appeal or during any putative sentencing or reparations phase. The Defence is required to act in a diligent manner. There is an ever-present risk that witnesses will become unavailable, or uncontactable. It would be negligent for the Defence to fail to take necessary steps to secure further information or evidence in a timely manner.

27. The right to contact witnesses who could have exculpatory information, cannot be made subject to any other conditions i.e, neither the Chamber nor the

³⁴ ICC-01/05-01/08-3070, para. 16.

³⁵ ICC-01/04-01/06-568, para. 54.

³⁶ *Prosecutor v. Blaškić*, Appeals Judgment, 29 July 2004, para. 268.

Prosecutor can require the Defence to divulge its strategy in advance or satisfy an arbitrary evidentiary threshold. The only issue which can be at stake in the present case is whether the witness in question agrees to communicate with the Defence.

28. P-169 has voluntarily disclosed his contact details and evidenced a willingness to communicate with the Defence in relation to such matters. The Defence must therefore be given the right to contact P169 – *via* the VWU – with a view to ascertaining whether he would be willing to meet with the Defence to discuss the matters set out in the Letter of 5 August.

29. Such a meeting is a necessary pre-cursor to any Defence request for recall of either P-169's, or any of the 21 witnesses listed in the Letter of 5 August. The ICTY Appeals Chamber in *Krštić* recognised that it would not be reasonable for the Defence to expect a witness to testify "'cold' in court without first knowing what he will say. That would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty."³⁷

30. Regardless, the Defence is obliged at this juncture to make some brief submissions on the potential for recall raised by the Letter of 5 August. Despite the late stage of the proceedings, this is not an unrealistic proposition.³⁸ The Defence's previous request to recall P-169 was denied,³⁹ as was a request for leave to appeal.⁴⁰ This denial was premised on the Defence's submission that the information contained in P-169's previous letters "put into admissible form for reception into evidence, may well obviate the need for the recall of any witnesses".⁴¹ With respect, the situation has now moved on. P-169 is now averring that his evidence was false,

³⁷ *Prosecutor v Krštić*, Appeals Chamber, Decision on Application for Subpoenas, 1 July 2003, para. 8.

³⁸ See, for example, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Decision of 14 July 1998; ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision granting Župljanin Motion to reopen its case, 3 April 2012.

³⁹ ICC-01/05-01/08-2924-Conf, para. 36.

⁴⁰ ICC-01/05-01/08-2980-Conf.

⁴¹ ICC-01/05-01/08-2924-Conf, para. 36.

or at least falls to be reconsidered, and the evidence of 21 other witnesses has been suborned. The Chamber is not just concerned with material which tends to suggest collusion and inducement, but which goes directly to the truthfulness and reliability of testimony.

31. The criteria for the recall of P-169 - and in fact each of the witnesses listed in P-169's annex - have been met. The Defence could not have obtained the information before their testimony through the exercise of reasonable diligence;⁴² a previous attempt by the Defence to contact P-169 to elicit this very kind of information was denied by the Chamber.⁴³ The implications of the Letter of 5 August constitute good cause warranting recall.⁴⁴ The parties are entitled to explore, and the Chamber is entitled to know, what aspects of his testimony does P-169 wish to "reconsider"? What did P-169 receive, and from whom, in order to testify in the manner that he did? Who was on the other side of the "bargain"? What is the evidence of subornation (which term the Defence takes to indicate the solicitation of false testimony through financial inducement) that the other 21 witnesses are willing to bring to the Court? Who convinced these 21 witnesses to give false testimony in the first place? Does this affect any of the other oral or documentary evidence in the case? Do the 21 witnesses stand behind any aspects of their testimony? Do they intend to implicate other troops, in a manner corroborative of the Defence case?

⁴² ICC-01/05-01/08-2924-Conf, para. 35, citing: ICC-01/05-01/08-1594-Red.

⁴³ ICC-01/05-01/08-3077-Conf, paras. 14-23.

⁴⁴ ICC-01/05-01/08-2924-Conf, para. 35, citing "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-J-T, Trial Chamber II, Decision on the Defence Motion for the Reexamination 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."

32. The Defence is not blind to the implications of recalling witnesses (nor to the potential scale of the exercise in the instant case). The Chamber declared the evidence closed pursuant to Rule 141, in April 2014.⁴⁵ The evidence would have to be re-opened, and the parties would evidently be required to file supplemental submissions to their Closing Briefs. The resulting delay in proceedings, however, must be weighed against ensuring that any judgment in Mr. Bemba's case is not based on a foundation of already-shaky evidence, which witnesses are now seeking to withdraw.

(b) The admission 5 August Letter as evidence in the case

33. In any event, the Defence submits that the Letter of 5 August must be admitted as evidence in the case, and the Defence be authorised to file supplemental submissions to Mr. Bemba's Closing Brief on the impact of the letter on the credibility of the Prosecution case. In the Defence submission, neither of these steps is sufficient to safeguard any judgment which relies upon the testimony of P-169 or the 21 witnesses as it currently stands, but will go some way to addressing the subsequent prejudice to the accused.

34. The Chamber held that two of P-169's previous letters met the criteria for admission into evidence;⁴⁶ namely that they were (i) relevant to the case; (ii) had probative value; and (iii) were sufficiently relevant and probative as to outweigh any prejudicial effect their admission could cause.⁴⁷

⁴⁵ ICC-01/05-01/08-3035.

⁴⁶ ICC-01/05-01/08-3015-Conf, para. 24.

⁴⁷ ICC-01/05-01/08-3015-Conf, para. 12, citing First decision on the prosecution and defence requests for the admission of evidence, 15 December 2011, ICC-01/05-01/08-2012-Red, paragraphs 13 to 16; and Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012, ICC-01/05-01/08-2299-Red, paragraphs 7 to 9.

35. The Letter of 5 August also satisfies these criteria. P-169 claims that his original testimony in July 2011 was as the result of a bargain. Now feeling “duped”, or having been sent on a fool’s errand, he speaks of an obligation to engage a lawyer and reconsider his testimony. This claim is relevant to the credibility of P-169’s testimony, relied upon so extensively by the Prosecution.⁴⁸

36. P-169’s statement that the 21 Prosecution witnesses listed in his annex are ready to bring evidence of subornation is also relevant to the credibility of the Prosecution’s case, in particular its allegations concerning crimes committed by MLC troops. The Prosecution dedicated 189 pages of its Closing Brief to an analysis of the evidence of these witnesses.⁴⁹ For the Prosecution, their evidence evidently forms a significant part of its case against Mr. Bemba. If proof exists that the testimony of these witnesses was “suborned”, this is undeniably relevant to the Chamber’s assessment of their credibility.

37. Moreover, the Prosecution has disclosed the Letter of 5 August pursuant to Article 67(2) of the Statute. The Prosecution thereby accepts that the information contained therein exculpates Mr. Bemba or undermines the reliability and credibility of the Prosecution case. It should accordingly form part of the case file, and be part of the Chamber’s deliberations.

38. With respect to the second prong of the three-part test, there is no dispute as to the probative value or provenance of the Letter of 5 August. It was produced by the Prosecution and accepted by the Defence as having been authored by P-169. The letter exhibits sufficient indicia of reliability to warrant its admission. It is dated, signed, and the author provides his contact details by way of an address and telephone number. It appears in the same style, tone and tenor as the previously

⁴⁸ Prosecution Closing Brief, fn. 26, 28, 42-43, 62, 66-68, 74, 80, 104-105, 107-108, 175, [REDACTED] 187-188, 209-210, 215, 227, 232, 298, 301, 303-304, 310-311, 317, 319, 324, 342, 345-346, 371, 379, 399, 402, 405, 420, 424, 426, 461-462, 471, 602, 732, 878-879, 881, 943, 1190, 1156, 1662, 1664-1668, 1675-1681, 1815, 1819, 1823, 1828-1829, 1848, 1853-1854, 1881, 1902, 1944, 2206-2209.

⁴⁹ ICC-01/05-01/08-3079, from para. 30 to para. 508.

admitted letters, although arguably its content is of greater concern, and heightened relevance to the case.

39. Neither party would be prejudiced by its admission into evidence. The Prosecution did not object to the admission of P-169's previous letters.⁵⁰ The Defence specifically asked the Prosecutor whether she objected to the admission of the Letter of 5 August.⁵¹ This question went unanswered.⁵² The Chamber can safely assume that the Prosecution's position remains the same. In any event, rather than causing any prejudice to the fairness of the trial,⁵³ admitting the Letter of 5 August will go some way to immunising the proceedings against future challenges and thus, do the opposite.

40. Upon admission of the Letter of 5 August, the Defence seeks leave to file supplemental submissions to Mr. Bemba's Closing Brief to address its impact on the Prosecution's case. No prejudice to the Prosecution arises, given that they are well aware of the letter's contents.

(c) P-169's first letter of 6 August 2011

41. On 29 August 2011, the late Maître Zarambaud filed the first in the series of P-169's letters before both the Trial and Appeals Chamber. This letter, dated 6 August 2011, was filed as an annex in response to Mr. Jean-Pierre Bemba's request for provisional release ("Letter of 6 August 2011").⁵⁴

⁵⁰ ICC-01/05-01/08-3015-Conf, para. 24.

⁵¹ See Annex A.

⁵² See Annex B.

⁵³ ICC-01/05-01/08-3015-Conf, para. 24.

⁵⁴ 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 1^{er} septembre 2011, 5 September 2011, ICC/01/05-01/08-1704-Conf-Anx2.

42. The Prosecution took a far more conservative view of the Letter of 6 August 2011. Following an urgent email from the Prosecution,⁵⁵ the Trial Chamber issued a plethora of orders to the Defence, on the basis that “extreme caution needs to be taken with regard to the dissemination of information regarding the identity, safety and location of protected witnesses.”⁵⁶ Notably, the Defence was ordered to provide “the address and telephone number”⁵⁷ of anyone on the Defence team who had (legitimately) accessed the letter following its apparently mistaken distribution by Maître Zarambaud.

43. The Chamber recognised, however, that the Defence should not be denied access to all the information contained in the Letter of 6 August 2011, particularly that regarding “payments allegedly received and promised”.⁵⁸ It held that the Defence was to be provided with a redacted version of the letter, and ordered:⁵⁹

The VWU, in consultation with the prosecution, to provide the Chamber with a proposed redacted version of the Letter that removes all sensitive information related to the security of witnesses and to VWU proceedings on the field, which can be provided to the legal representatives and defence. The proposed redactions shall be submitted to the Chamber no later than 10:00 on Tuesday, 13 September 2011.

44. P-169 has now [REDACTED] which sets out his telephone number and residence, and details his encounters with VWU staff in the field. As such, any redactions to the Letter of 6 August 2011 are now without object. The Defence accordingly requests that it be provided with an unredacted copy of the Letter of 6 August 2011, following which it may revert to the Chamber seeking its admission in the case.

⁵⁵ Email from Senior Trial Attorney to Legal Officer of the Trial Chamber, 9 September 2011, 13:45.

⁵⁶ ICC-01/05-01/08-1727-Conf, para. 9.

⁵⁷ ICC-01/05-01/08-1727-Conf, para. 13(c).

⁵⁸ ICC-01/05-01/08-1727-Conf, para. 12.

⁵⁹ ICC-01/05-01/08-1727-Conf, para. 14(b).

(d) Provision of the covering email to P-169's letter

45. Both P-169's letters of 7 June⁶⁰ and 8 June 2013 were disclosed together with the covering email.⁶¹ Having raised this with the Prosecutor, the Prosecution Senior Trial Attorney responded that the Prosecution had received the letter from VWU, and no covering letter had been transmitted.⁶²

46. The Letter of 5 August was not addressed to the Prosecution. P-169 wrote to [REDACTED]
[REDACTED] In these circumstances, VWU's provision of the letter directly to the Prosecution a month after receiving it appears inconsistent with its duties as a neutral organ. As discussed above, there is no property in a witness, and the Trial Chamber has been clear that the Protocol concerning contacts between witnesses and parties does not apply to possible post-testimony contact.⁶³

47. Regardless, the Defence asks that VWU be directed to provide any covering email or correspondence which accompanied the Letter of 5 August to the Defence, this being relevant to the Defence's full assessment of the contents of the letter and the intention of the author concerning its distribution.

(e) Amendment of the current timetable

48. Absent an indication from the Chamber that it does not intend to rely on the evidence of either P-169 or the 21 implicated witnesses, the intervention of this episode at this juncture must necessarily impact upon the existing timetable for the conclusion of the trial. The Defence, having received this material on 4 September 2014, has sought certain *inter partes* resolution of issues and placed the matter before

⁶⁰ ICC-01/05-01/08-2827-Conf-Red-AnxA.

⁶¹ ICC-01/05-01/08-2827-Conf-Red-AnxB.

⁶² See Annex B.

⁶³ ICC-01/05-01/08-3070, para. 16.

the Chamber with all due diligence. The Prosecution has been in possession of the letter before its provision to the Defence, and must have taken a position on all the issues raised herein in that time. The time for its response should be significantly abridged.

49. Assuming that the Chamber is persuaded that the Defence ought to be given time to investigate the matter raised in the letter, then the suspension of all deadlines beyond the filing of the Prosecution Response Brief would, in the Defence submission, be a necessary ancillary order. Convening a Status Conference to discuss the practical realities of further investigations would be an expedient measure.

(f) Level of Confidentiality

50. This motion is filed confidentially, however, a public redacted version will be filed in due course. The Chamber should direct the filing of publicly redacted responses.

51. In the light of the intended widespread publication of the Letter of 5 August 2014, there is little purpose in the document itself, suitably redacted, nor the filings relating to it, remaining confidential. Neither is there any subsisting logic in P-169's prior correspondence with the ICC, and the filings relating to those documents, not being in the public domain, in suitably redacted form. The Defence invites the Chamber to order the production of the same, subject to any appropriate input from VWU.

C. RELIEF SOUGHT

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

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 August 2011;

ORDER VWU to provide the Defence with any covering email or correspondence to the Letter of 5 August;

ORDER the reclassification as public 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

ORDER an abridgement of the time in which the Prosecution may respond to the present filing.

Should the Trial Chamber decline to order the above relief, the Defence requests that the Chamber;

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;

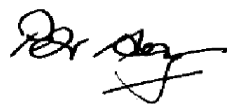
ORDER that the Defence be provided with an unredacted copy of the Letter of 6 August 2011;

ORDER VWU to provide the Defence with any covering email or correspondence to the Letter of 5 August;

ORDER the reclassification as public 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

ORDER an abridgement of the time in which the Prosecution may respond to the present filing.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

11 September 2014