

**Cour
Pénale
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**International
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Court**

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

Date: 10 October 2014

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

Confidential Document

With

**Confidential Annex A and Confidential, *EX PARTE*, Annex B only available to the
Prosecution and Victims and Witnesses unit**

**Prosecution's Response to « Defence Urgent Motion for disclosure of materials
relating to P-169 and remedies for non-disclosure »**

Source: The Office of the Prosecutor

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

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I. Introduction

1. On 9 October 2014, the Defence team of Mr Jean-Pierre Bemba Gombo (“Defence”) filed its motion for urgent disclosure of materials related to P-0169 and remedies for non-disclosure.¹ The Defence requested the Trial Chamber III (“Chamber”) to, *inter alia*, order the Office of the Prosecutor (“Prosecution” or “OTP”) to: (i) immediately disclose all emails and other written exchanges, and records of communications with P-0169 and any of the 21 witnesses; (ii) immediately disclose all payments and other forms of assistance given by the Prosecution to P-0169 and the 21 witnesses; (iii) reprimand the Prosecution for its failure to comply with its disclosure obligations in the present case; and (iv) conduct a review of its case file and certify that all disclosable material has been provided to the Defence (“Defence Motion”).²

2. The Prosecution opposes the Defence Motion in its entirety as it has complied with its disclosure obligations. The additional information requested by the Defence is neither potentially exculpatory under Article 67(2) of the Rome Statute (“Statute”) nor material to the preparation of the Defence pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”). Further, Annex A appended to this response is a detailed report explaining the reason for the late disclosure of the 11 June 2014 Letter sent by P-0169.

II. Submissions

¹ ICC-01/05-01/08-3159-Conf, Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure, 9 October 2014.

² ICC-01/05-01/08-3159-Conf, paras. 10 and 35.

3. The Prosecution has disclosed the information on reimbursement and expenses paid to P-0169, who is now scheduled to testify on this and other limited issues.³ The Prosecution maintains that all moneys paid to P-0169 fall within the scope of ordinary and legitimate witness expenses. The Defence refers to a payment by the Prosecution to P-0169 in September 2011 as an example of an extra-ordinary payment.⁴ In fact, this payment was made on behalf of the Victims and Witnesses Unit (“VWU”).

4. Furthermore, although the 11 June 2014 Letter from P-0169 was sent to the Operational Support Unit of the OTP (“OSU”) on 13 June 2014, it was only discovered by an OSU Operations Officer a few days ago, as explained in a memorandum drafted by the OSU and appended to this response as Annex A. As the Defence submitted almost at the same time two requests to the Prosecution for disclosure of materials related to P-0169,⁵ the Prosecution conducted a review of materials in its possession and disclosed evidence pursuant to Article 67(2) of the Statute and Rule 77 of the Rules,⁶ including the 11 June 2014 Letter.⁷

5. The 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. The Defence incorrectly contends that “[t]he documents concerning these payments were disclosable at the time of their creation.”⁸ Although the disclosure of Rule 77 information is broad, it is not

³ ICC-01/05-01/08-3158+Conf-Anxs, Prosecution’s Communication of Evidence disclosed to the Defence on 8 October 2014 pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, 8 October 2014. The Prosecution disclosed courtesy copies of the documents *via* email on 7 October 2014 at 14:41.

⁴ ICC-01/05-01/08-3159-Conf, paras. 15-16.

⁵ Email from Ms Cecile Lecolle to Mr Jean-Jacques Badibanga on 30 September 2014 at 10:40 hrs. The Defence requested disclosure of all emails and written exchanges with P-0169. Email from Ms Cecile Lecolle to Mr Jean-Jacques Badibanga on 2 October 2014 at 13:40 hrs. The Defence requested, *inter alia*, disclosure of payments and other forms of assistance given by the Prosecution to P-0169.

⁶ ICC-01/05-01/08-3158, Prosecution’s Communication of Evidence disclosed to the Defence on 8 October 2014 pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence, 8 October 2014.

⁷ The cover email of the 11 June 2014 Letter will also be disclosed on 10 October 2014.

⁸ ICC-01/05-01/08-3159-Conf, para. 17.

unlimited.⁹ Following a previous Defence request for disclosure,¹⁰ the Chamber ruled that “payments, benefits or other forms of assistance that go beyond the ordinary requirements of subsistence may affect the credibility of witnesses ...”¹¹ However, in spite of the Defence request, the Chamber did not order the Prosecution to disclose expenses related to the same witnesses referred to in this Defence Motion.¹² Thus, the Prosecution submits that witness expenses do not ordinarily fall within the scope of Rule 77 unless they go beyond ordinary payments.

6. The expenses paid to the other 21 witnesses have not been disclosed to the Defence because they are ordinary payments. The Prosecution submits that this is in line with the Chamber’s ruling that such information “may” be material to the preparation of the Defence if it is beyond the ordinary requirements of subsistence.¹³ The simple fact that P-0169 alleges that he has information that Prosecution witnesses were promised money is not a sufficient basis for disclosure of regular and legitimate payments made to those witnesses. Additionally, the information in the case record shows that some of the 21 witnesses do not even know of P-0169, whilst others stated that they have not co-operated with him.¹⁴ The Defence has not demonstrated a *prima facie* basis¹⁵ to warrant the disclosure of these expenses to the 21 witnesses.

⁹ ICC-01/05-01/08-1594-Conf, Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 12 July 2011, para. 21.

¹⁰ Defence Motion concerning “Information on contacts with witnesses 169 and 178 with other witnesses”,

11 November 2013, ICC-01/05-01/08-2872-Conf, para. 50.

¹¹ ICC-01/05-01/08-2924-Conf, Decision on “Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, para. 19. [Emphasis added]

¹² See, Defence Motion concerning “Information on contacts with witnesses 169 and 178 with other witnesses”, 11 November 2013, ICC-01/05-01/08-2872-Conf, para. 50; ICC-01/05-01/08-2897-Conf, Prosecution’s Response to Defence Motion concerning “Information on contacts of Witnesses 169 and 178 with other witnesses”, 15 November 2013, paras. 13-17; ICC-01/05-01/08-2924-Conf, Decision on “Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, para. 38.

¹³ ICC-01/05-01/08-2924-Conf, Decision on “Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, para. 25.

¹⁴ Status Conference of 23 September 2014, ICC-01/05-01/08-T-360-CONF-ENG ET, page 49, lines 4-17.

¹⁵ ICC-01/05-01/08-632, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, para. 27.

7. The Prosecution is not required to disclose all records of communications with witnesses (be it email, written exchanges or otherwise) unless such information is Rule 77 or potentially exculpatory under Article 67(2). The Prosecution has disclosed the relevant communications regarding P-0169 and there is no relevant information related to the other 21 witnesses.¹⁶ This Chamber has previously held that the Rule 77 “requirement, therefore, is not for the prosecution to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection; it is, instead, to provide all the items that are material to the preparation of the defence. This inevitably involves an exercise of judgment on the part of the prosecution as to what is relevant (“material”), on the basis of all the available information, and including anything revealed to the accused.”¹⁷ Therefore such information is only disclosable if it is relevant to the case, including the issues bearing upon the limited hearing of P-0169. Similarly, in a previous ruling, “the Chamber reject[ed] the defence submission that the prosecution has an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of “handing the defence the keys to the warehouse” in this way.”¹⁸

8. The Prosecution has complied with its on-going disclosure obligations and there is no basis to find otherwise. The Prosecution has provided justification for the late disclosure of the 11 June Letter from P-0169 for the Chamber’s assessment. The Accused

¹⁶ ICC-01/05-01/08-2924-Conf, Decision on “Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, para. 30: “... the Chamber is of the view that there is currently no suggestion that the prosecution is in possession of any additional material that would have the potential to affect the credibility of the Individuals or be material to the preparation of the defence.”

¹⁷ ICC-01/05-01/08-632, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, para. 20.

¹⁸ ICC-01/05-01/08-632, para. 26, citing “Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court. Issued by the Judiciary of England and Wales”, 20 February 2006, paragraph 31.

is not prejudiced by the late disclosure of the two page letter.¹⁹ The Defence is already privy to similar information prior to P-0169's upcoming testimony, which it can explore along with other letters in its possession that contain the relevant information. The Chamber previously ruled that it "is not convinced that ordering the prosecution to conduct a full review of all relevant databases and archives and to provide the defence with any additional disclosable material in its possession, by a certain date, would serve any purpose or address the issue of unavoidable late disclosure. Similarly, the Chamber sees no merit in ordering the prosecution to certify that it has fulfilled its disclosure obligations as regards Article 67(2) items and Rule 77 material, since as previously stressed, such disclosure obligations are ongoing during the defence's presentation of evidence."²⁰ The Prosecution submits that this reasoning remains valid and the Chamber should conduct its assessment on a case-by-case basis.

9. Finally, the Prosecution opposes the allegation that emails sent by the Defence and annexed to the Defence Motion were not addressed by the Prosecution, except for the email contained in Annex I, about the circumstances of receipt by the Prosecution of the 11 June 2014 Letter, which are clarified in the memorandum attached to this Response as Annex A.

III. Request for confidentiality

10. The Prosecution requests that this document and Annex A to this response be received as "Confidential" as they respond to the Defence Motion bearing the same classification. The Prosecution also requests that Annex B be received as "Confidential,

¹⁹ CAR-OTP-0083-1303.

²⁰ ICC-01/05-01/08-2292, "Decision on 'Defence Motion Regarding Prosecution Disclosure", 3 September 2012, para. 13.

Ex Parte, available only to Prosecution and VWU", as it contains information related to witness management and protection issues that should not be revealed.

IV. Conclusion

11. For all the above reasons, the Prosecution respectfully requests the Chamber to reject the Defence Motion in its entirety.



Fatou Bensouda, Prosecutor

Dated this 10th Day of October 2014

At The Hague, The Netherlands