

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 December 2014

TRIAL CHAMBER III

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

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

Public

**Public redacted version of "Decision on 'Defence Request for Leave to Reply to the
'Prosecution's Response to 'Defence Urgent Motion for disclosure of materials
relating to P-169 and remedies for non-disclosure'"**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

Trial Chamber III ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, hereby issues the following Decision on "Defence Request for Leave to Reply to the 'Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'".

I. Background

1. On 8 October 2014, the Office of the Prosecutor ("prosecution") disclosed 26 items under Rule 77 as well as one item pursuant to Article 67(2) of the Statute.¹ The item disclosed pursuant to Article 67(2) of the Statute is a letter dated 11 June 2014 ("June 2014 Letter"), signed by Witness P169 and addressed to the Secretary General of the United Nations, with copies appearing to be addressed to several Court officials and [REDACTED].²
2. On 9 October 2014, the defence for Mr Jean-Pierre Bemba ("defence") filed its "Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure" ("Defence Motion"),³ in which it requests, *inter alia*, that the Chamber:⁴

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 [REDACTED], and any other video or audio recordings, minutes and/or notes of

¹ See 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, ICC-01/05-01/08-3158 and confidential Annexes A to C. Courtesy copies of the disclosed items were circulated via email on 7 October 2014 at 18.07.

² CAR-OTP-0083-1303.

³ Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure, 9 October 2014, ICC-01/05-01/08-3159-Conf.

⁴ ICC-01/05-01/08-3159-Conf, paragraph 35.

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 [REDACTED], 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;

3. On 10 October 2014, the prosecution filed its "Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'" ("Prosecution Response"),⁵ in which it asserts that it has complied with its on-going disclosure obligations⁶ and entreats the Chamber to dismiss the Defence Motion in its entirety.⁷ The prosecution *inter alia* maintains that "all moneys paid to P-0169 fall within the scope of ordinary and legitimate witness expenses."⁸ With reference to a payment made by the prosecution to Witness P-169 in September 2011, and referred to by the defence as an "example of an extraordinary payment",⁹ the prosecution specifies that "this payment was made on behalf of the Victims and Witnesses Unit."¹⁰ In relation to the June 2014 Letter, the prosecution submits that although it was sent to the Operational Support Unit ("OSU") on 13 June, "it was only discovered by an OSU Officer a few days ago", as explained in a memorandum drafted by the OSU and appended as

⁵ Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure', 10 October 2014, ICC-01/05-01/08-3160-Conf.

⁶ ICC-01/05-01/08-3160-Conf, paragraphs 2 and 8.

⁷ ICC-01/05-01/08-3160-Conf, paragraph 11.

⁸ ICC-01/05-01/08-3160-Conf, paragraph 3.

⁹ ICC-01/05-01/08-3159-Conf, paragraphs 15 to 16. The document referred to by the defence is registered under ERN CAR-OTP-0065-0987.

¹⁰ ICC-01/05-01/08-3160-Conf, paragraph 3.

Annex A to the Prosecution Response.¹¹ It further contends that the defence is not prejudiced by the late disclosure of the June 2014 Letter since it “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.”¹² Concerning the request for disclosure of expenses related to the other 21 witnesses, the prosecution submits that they are not disclosable under Rule 77 of the Rules of Procedure and Evidence (“Rules”). In this regard, the prosecution stresses that (i) they are related to reimbursements of ordinary expenses and therefore do not constitute “payments, benefits or other forms of assistance that go beyond the ordinary requirements of subsistence [which] may affect the credibility of witnesses”;¹³ and (ii) “[t]he 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.”¹⁴

4. On 13 October 2014, pursuant to Regulation 24(5) of the Regulations of the Court (“Regulations”), the defence filed its “Defence Request for Leave to Reply to the ‘Prosecution’s Response to ‘Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure’” (“Request for Leave to Reply”),¹⁵ in which it “seeks leave to present a focused and limited reply to the

¹¹ ICC-01/05-01/08-3160-Conf, paragraph 3.

¹² ICC-01/05-01/08-3160-Conf, paragraph 8.

¹³ ICC-01/05-01/08-3160-Conf, paragraph 5. The prosecution refers to the “Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 18 December 2013, ICC-01/05-01/08-2924-Conf, paragraph 19.

¹⁴ ICC-01/05-01/08-3160-Conf, paragraph 6.

¹⁵ Defence Request for Leave to Reply to the ‘Prosecution’s Response to ‘Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure’, 13 October 2014, ICC-01/05-01/08-3164-Conf.

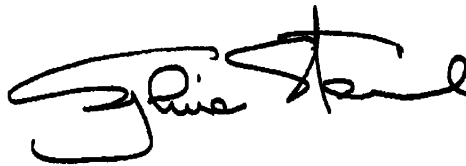
arguments contained in the Prosecution Response.” In particular, the defence seeks leave to reply in relation to the following points:¹⁶

- (i) Whether the Prosecution has erred in framing its disclosure obligations too narrowly, given that, in principle, its communication with the 21 witnesses in question is *prima facie* material to Defence preparations, particularly given the allegation of subornation of these witnesses, and given that no exemption has been sought on the grounds that the material in question is internal work product or is relevant to ongoing investigations. This is the moreso given the tendentious arguments the Prosecution apparently will seek to mount about the so-called “impetus” for the allegations in P169’s August 2014 Letter (it is apparently to be suggested that this has something to do with a conversation which took place 9 months previously in November 2013). In such circumstances the sentiments of P-169 and the other allegedly suborned witnesses expressed through emails would seem to be of quintessential relevance;
- (ii) Whether an undated, unsigned internal Prosecution memorandum, can rebut an evidential presumption that an email is received on the date it is sent, in the absence of sworn testimony or a sworn affidavit as to the accuracy of the memorandum’s contents;
- (iii) What is the impact of the Prosecution’s assertion that a payment made by the Prosecution directly to a witness was actually made “on behalf of the Victims’ and Witness’ Unit”, in the absence of any evidence that it was understood as such by the witness in question;
- (iv) Whether the Prosecution should be required to disclose all payments made to Prosecution witnesses “on behalf of the Victims’ and Witness’ Unit”, given the impact that the blurring of lines between the Prosecution and VWU - an independent and neutral arm of the Registry - could have on the credibility of all witnesses who received substantial payments from members of the Prosecution team or other Prosecution staff; and
- (v) Whether the Prosecution’s refusal to disclose communication with its witnesses (despite a targeted Defence request, and their materiality to Defence preparation of P-169’s examination), in light of previous Prosecution submissions concerning the lack of confidentiality which attaches to communications between a witness and the calling party; and the Prosecution’s view of its own alleged unfettered access to Defence witnesses; has given rise to an inequality of arms which undermines the fairness of the present proceedings.

¹⁶ ICC-01/05-01/08-3164-Conf, paragraph 9.

5. The Chamber is of the view that it may benefit from the defence's views on certain issues set out in its Request for Leave to Reply. The Chamber reminds the defence that its reply must be narrowly tailored to only address new issues raised in the Prosecution Response.
6. Additionally, in light of the fact that the Prosecution Response is comprised of eight pages and noting the specific issues on which the defence seeks leave to reply, the Chamber considers, pursuant to Regulation 37(1) of the Regulations, that it is appropriate that the defence reply be limited to no more than eight pages.
7. In view of the above, the Chamber hereby:
 - a. GRANTS the Request for Leave to Reply, pursuant to Regulation 24(5) of the Regulations;
 - b. ORDERS that the defence's reply be filed no later than 15 October 2014; and
 - c. ORDERS that the defence reply not exceed eight pages, pursuant to Regulation 37(1) of the Regulations.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 11 December 2014

At The Hague, the Netherlands