

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 13/10/2014

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

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'"

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

Jean-Jacques Badibanga

Counsel for the Defence

Peter Haynes QC

Kate Gibson

Melinda Taylor

Legal Representatives of the Victims

Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for Victims

Paolina Massida

The Office of Public Counsel for the Defence

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Nigel Verrill

Detention Section

Victims Participation and Reparations Other Section

A. INTRODUCTION

1. Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence seeks leave of Trial Chamber III (“the Chamber”) to reply to the Prosecution’s Response to “Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure” (“Prosecution Response”).¹ The Defence submits that a limited reply will assist the Chamber in its determination of the Defence motion.

B. BACKGROUND

2. On 2 October 2014, the Chamber ordered the recall of P-169.² Being the subject of re-call, the situation of P-169 is not analogous to the situation of a witness testifying for the first time. Contact with the Prosecution following his testimony becomes analogous to pre-testimony contacts and is accordingly disclosable.³

3. On 9 October 2014, the Defence filed its “Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure”, in which it asked the Chamber for the following relief: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 21 witnesses listed in the annex to

¹ ICC-01/05-01/08-3160-Conf.

² ICC-01/05-01/08-3155.

³ *Prosecutor v. Haradinaj et al.*, IT -04-84bis-T, Decision on Lahimi Brahimaj’s Urgent Motion seeking Memorialisation of further contact between Prosecution and Witness 3, 31 October 2011.

⁴ ICC-01/05-01/08-3159-Conf.

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; [...]

4. The Defence did not ask for unfettered access to communication between the Prosecution and its witnesses. The Defence request was limited to those witnesses whose credibility is now called into question by the assertion from P-169 that they are ready to bring proof that their testimony was suborned. The Defence request fell squarely within the scope of jurisprudence that recognises that all communications with a witness on issues that could be perceived as relating to a possible

inducement to testify are not only material to the preparation of the defence, but also exculpatory.⁵

5. To date, the Defence has not received any disclosure of payments made to any of the 21 witnesses in question, nor any disclosure of Prosecution communications with these witnesses.

C. SUBMISSIONS

6. In response to the Defence motion, the Prosecution submits to the Trial Chamber that it has “complied with its disclosure obligations”.⁶ The Prosecution seeks to explain away the disclosure of the 11 June Letter nearly four months after it was received, by reference to an unsigned and undated internal Prosecution memorandum (“Memo”). This Memo reveals that the 11 June Letter was indeed received by the Prosecution on 13 June 2014, but a practice of communicating with witnesses via external or “Hotmail” email accounts, but then not monitoring these email accounts, has led to the non-disclosure of exculpatory material to the Defence. The assertion is entirely uncorroborated as the covering email to the 11 June letter (itself not disclosed until 10 October) has been redacted to hide the critical recipient.⁷ Neither the Defence nor the Chamber is in any position to determine whether the email was sent to a Hotmail account at all.

7. Moreover, no explanation is given as to why an OSU Operations Office accessed the account in question on 23 September 2014,⁸ yet the 11 June Letter contained therein was not disclosed to the Defence for another 14 days.

⁵ *Prosecutor v. Haradinaj et al.*, IT -04-84bis-T, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions pursuant to Rule 68bis, 12 October 2011.

⁶ ICC-01/05-01/08-3160-Conf, para. 2.

⁷ CAR-OTP-0083-1327_R01.

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

8. Notably, the Memo attached to the Prosecution Response revealed that it was not only P-169 who had been communicating with the Prosecution via an external Hotmail email account. The Operations Officer who authored the Memo noted that:⁹



9. The Defence seeks leave to present a focused and limited reply the arguments contained in the Prosecution Response, in particular on the following points:

(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).¹⁰ 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

⁹ ICC-01/05-01/08-3160-Conf-AnxA, p.3.

¹⁰ ICC-01/05-01/08-3138-Conf, paras.15-18 ; ICC-01/05-01/08-T-360-Conf-Eng, p.43, lines 1 – p.46, line 3.

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",¹¹ 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;¹² 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.

10. There is good cause for the Defence to be accorded an opportunity to address the above issues. The Defence submits that a limited and focused reply may benefit the Chamber in its determination of an issue critical to the fair trial rights of the

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

¹² ICC-01/05-01/08-3058, para. 15.

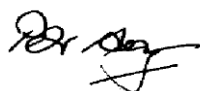
Accused and the conduct of the proceedings. Affording the Defence a right of reply is accordingly in the interests of justice.¹³

D. REQUESTED RELIEF

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

GRANT the 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."

The whole respectfully submitted.



Peter Haynes QC
Counsel for Mr. Jean-Pierre Bemba

The Hague, The Netherlands

13 October 2014

¹³ ICC-01/05-01/08-2942, para. 4.