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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 Annex A

**Defence Submissions on Admission of Documents related to CAR-OTP-WWWW-
0169's testimony**

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. On 8 October 2014, Trial Chamber III ("the Chamber") rendered its 'Decision on the modalities of the presentation of additional evidence pursuant to Articles 64(6)(b) and (d) and 69(3) of the Rome Statute'. Concerning the documents which the parties intended to use during the examination of P-169, the Chamber held as follows:¹

The Chamber will rule in court on the admissibility of items used during the questioning of the witness. In order to facilitate the Chamber's ruling, the parties and the legal representative should indicate by email, no later than 10 October 2014, whether they intend to submit into evidence any of the materials included in either their list or the Chamber's list. **Such notification should include all information relevant to the three-part test of relevance, probative value, and potential prejudice.**

2. In accordance with this order, the Defence submitted, by way of email, a proposed list of documents for the examination of P-169, as well as submissions concerning the admissibility of documents for which it was seeking admission into evidence.²

3. The Prosecution has yet to comply with the Chamber's order.³

4. During the hearing on 24 October 2014, the Trial Chamber ruled as follows:⁴

the Chamber expects Defence - instructs Defence to file in the record of the case its list of documents, including their explanations as to whether the documents satisfy the three-part

¹ ICC-01/05-01/08-3157-Conf, para. 7.

² Email of 10 October 2014 at 16:00 "List of documents to be used with P-169" and email of 24 October 2014 at 12:07, "Admission of documents 37-45".

³ T-363-CONF-ENG-ET, p.30, lines 3-13.

⁴ T-363-CONF-ENG-ET, p.34, lines 10-14.

test since it was done only by email and it would be better if we have it in the record of the case.

5. Pursuant to this order, the Defence hereby files the present submissions to ensure their inclusion in the record of the case.

B. SUBMISSIONS

(i) Letter of 11 June 2014

6. The document CAR-OTP-0083-1303 is a letter dated 11 June 2014, sent by P-169 addressed to [REDACTED] and copied to [REDACTED]

[REDACTED]
[REDACTED].

7. The Letter of 11 June contains allegations by Witness P-169 of outstanding claims of payments, benefits and others forms of assistance, subordination of witnesses, and the reconsideration of his own testimony. It is therefore relevant to the credibility of Witness P-169 and his evidence.

8. With respect to its probative value, the Letter of 11 June was produced by the Prosecution and accepted by the Defence as being authored by P-169. According to the Prosecution's description of the chain of custody, the letter was sent by P-169 to the Prosecution OSU. It is therefore apparent that the Prosecution accepts that the letter emanates from P169. It contains language similar to the letters of 7 and 10 June 2013 previously admitted by the Chamber in its decision ICC-01/05-01/08-3015-Conf. The letter is dated, signed, and bears sufficient indicia of reliability as warrant its admission

9. The Letter of 11 June is known to the Prosecution, who did not object to the admission of the 7 and 10 June 2013 letters,⁵ nor did it object to the admission of the 5 August 2014 letter, and has conceded that the latter may be relevant to the Trial Chamber's assessment of the witness's credibility.⁶ The Letter of 11 June 2014 therefore would not prejudice any party by its admission into evidence as, like the other letters written by this witness, is essential to an assessment of the credibility of P-169.

(ii) Covering Email to the Letter of 5 August

10. ICC-01/05-01/08-3151-Conf-Anx is the covering email to the Letter of 5 August 2014, written by P-169, received by the Registry on 23 August 2014, and disclosed to the Defence on 25 September 2014.⁷

11. This covering email contains the email addresses of several of the recipients of the Letter of 5 August. It is relevant to an understanding of the intention behind P-169's correspondence, and the people with whom he was in contact to address his claims. The email is accordingly relevant to an assessment of his credibility.

12. With respect to probative value, the covering email was provided by the Registry and accepted by the Prosecution and the Defence as coming from P-169. The Prosecution has confirmed that the email address belongs to P-169, and has further confirmed that it was addressed by him to a particular Prosecution email account that was only known to P-169. The Prosecution did not contest the authenticity of that email. In addition the email address bears sufficient indicia of reliability as warrant its admission under the jurisprudence of this Chamber. The

⁵ ICC-01/05/01/08-2339-Conf, para. 32.

⁶ ICC-01/05/01/08-3138-Conf-Red, para. 17.

⁷ ICC-01/05/01/08-3151-Conf.

Chamber has previously held that a document has sufficient probative value for admission because “it is dated, and contains email addresses”.⁸

13. The covering email was known to the Prosecution well before the Defence was provided a copy. The Prosecution has had more than sufficient time to formulate a strategy in relation to its impact on the case. Moreover, this covering email is necessary to help to evaluate properly the credibility of P-169. Thus, neither party would be prejudiced by the item’s admission into evidence.

14. The same reasoning also applies to the covering email of the 11 June Letter which the Defence received on 10 October 2014.⁹

(iii) Receipts and reimbursements

15. Some of the documents disclosed by the Prosecution on 7 October 2014 are reimbursements of expenses incurred by P-169 in relation to the interviews conducted by the Office of the Prosecutor in 2009, and reimbursements made by the Prosecution to P-169 at various other times, namely: CAR-OTP-0046-0410; CAR-OTP-0046-0411; CAR-OTP-0046-0412; CAR-OTP-0046-0413; CAR-OTP-0046-0415; CAR-OTP-0046-0416; CAR-OTP-0062-0030; CAR-OTP-0062-0031; CAR-OTP-0065-0017; CAR-OTP-0065-0018; CAR-OTP-0065-0900; CAR-OTP-0065-0923; CAR-OTP-0065-0924; CAR-OTP-0065-0925; CAR-OTP-0065-0983; CAR-OTP-0065-0985; CAR-OTP-0065-0987; CAR-OTP-0043-0404; CAR-OTP-0066-0280; CAR-OTP-0066-0282; CAR-OTP-0066-0284; CAR-OTP-0066-0294; CAR-OTP-0066-0297.

16. These payment records demonstrate that the Prosecution has subsidised P-169 for travels and meals during his 4 days interview process, and continued to do so both before and after his testimony. The issue of payments received by P-169 is relevant to the Chamber’s examination of his credibility. Indeed, the Chamber has

⁸ ICC-01/05-01/08-3034, para. 84.

⁹ Disclosure Pexo –Article 67(2)- Batch 84; CAR-OTP-0083-1327.

ordered the recall of P-169 to testify as to the veracity of claims in his letters including, *inter alia*, the “money that was promised by the Prosecution”. The documents in question are directly relevant to this question, and are also relevant to the Prosecution’s assertion “any reimbursement by the Prosecution to witnesses of expenses that do not go “beyond the ordinary requirements of subsistence”, such as transportation and meals”.¹⁰

17. Each of the documents has been signed by a member of the Prosecution, and have been disclosed by the Prosecution to the Defence, which does not dispute their authenticity. Nor can there be any prejudice to the Prosecution in their admission, given that the Prosecution is well aware of their existence, and will have a chance to examine P-169 on their contents. Moreover, the admission of these documents will go some way towards addressing the prejudice suffered by the accused due to their extremely late disclosure.¹¹

(iv) Emails

18. CAR-OTP-0065-0988 and CAR-OTP-0065-0989 are two emails relating to payments made to P-169 in September 2011. The emails are relevant because they show that the VWU and the Prosecution have liaised to discuss payments to be given to P-169 following the completion of his testimony. They also show that payments have been made directly by the Prosecution, and not the VWU, which is relevant to the credibility of P-169, and the subject matter of his testimony during his recall. It is also relevant to an assessment of the Prosecution’s assertion that “[a]ny 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

¹⁰ ICC-01/05-01/08-2897-Conf, para. 16.

¹¹ ICC-01/05-01/08-3159-Conf.

involved the VWU and has been submitted to the VWU that deals with these matters as part of its mandate.”¹²

19. As to probative value, the content of these emails is confirmed by the record of reimbursement signed by a Prosecution staff member (CAR-OTP-0065-0987). Moreover, the Chamber has previously held that a document exhibited sufficient probative value warranting admission because “it is dated, and contains email addresses”.¹³

20. Finally, the admission of these emails will not cause any prejudice to the fair trial of to a fair evaluation of the testimony P-169 given that they are directly relevant to his credibility. The same reasoning can be applied for CAR-OTP-0066-0295 and CAR-OTP-0066-0298. The email from two Prosecution members shows proof not only that the Prosecution has kept funding P-169 after his testimony but also that the Prosecution has met with him.

(v) Email from the Prosecution to the Defence dated 10 September 2014

21. ICC-01/05-01/08-3139-AnxB is directly relevant to the issue of the credibility of P-169 as a witness of truth. In this email, the Prosecution maintains its intention to rely on the testimony of P-169 whilst simultaneously averring that P-169 has submitted correspondence to ICC addressees (and others), which is “entirely untruthful”, as part of what appears to be a campaign to receive further financial benefits. It is essential that the Defence has the opportunity to explore this apparent discrepancy with P-169: i.e. whether the contents of the letter are indeed untruthful, and if that were to be the case, whether this means that he might have submitted ‘untruthful’ information to the ICC on previous occasions.

¹² ICC-01/05-01/08-2897-Conf, para. 17.

¹³ ICC-01/05-01/08-3034, para. 84.

22. The email was authored by the Prosecution, and is dated. The Prosecution addressed it to the Defence in connection with P-169 and therefore had a reasonable expectation that it would be used by the Defence in connection with litigation concerning P-169. The email was in fact filed by the Defence and is now part of the official case record. The Prosecution had an opportunity to respond to this filing. The Prosecution is therefore not prejudiced by its admission.

(vi) Prosecution's Additional Submissions on P-169's communication on 23 August 2014¹⁴

23. This filing contains important evidential information concerning contact between P-169 and the Prosecution, the frequency of such contact, and the methods of such contact. This information is relevant to the identity of P-169 as the author of the above letters and emails.

24. The filing is part of the official case record, has been authored by the Prosecution in the course of litigation concerning P-169, and such, the Prosecution is not prejudiced through its admission. Unless the Chamber is prepared to allow the Defence to access and investigate the email accounts in question, it is the only means by which the Defence can explore these issues with P-169.

(vii) P-169's Letter of 5 August 2014

25. The Letter of 5 August 2014 has not been included on the Defence list of documents above, given that it appears on the Trial Chamber's own list of documents,¹⁵ and given the Chamber's instruction that the parties' lists should include "other documents" upon which they may wish to rely.¹⁶ However, the Defence maintains its request for admission of this letter, and incorporated by

¹⁴ ICC-01/05-01/08-3150-Conf.

¹⁵ ICC-01/05-01/08-3157-Conf-Anx-Corr.

¹⁶ ICC-01/05-01/08-3157-Conf, para. 6.

references its submissions set out in ICC-01/05-01/08-3139-Conf, paragraphs 33 to 40, and T-360-Conf-Eng, page 54, lines 18-21.

26. In addition, the Defence notes that in the chain of custody concerning this letter, the Prosecution has described the letter as having been transmitted by P-169. Moreover, in filing ICC-01/05-01/08-3150-Conf-Red, the Prosecution further confirmed that the letter was addressed to an email account that had been specifically set up for P-169. There is no indication that anyone other than P-169 would have been aware of this email account.

(viii) P-169's identity card

27. CAR-CE-00000016582 is P-169's identity document and is directly relevant to the identification of the witness. Having authored numerous letters, it is essential that the Defence has the opportunity to explore an apparent discrepancy in P-169's name and establish his identity.

28. [REDACTED]
[REDACTED] and has been in possession of the Prosecution since 12 November 2009, when two Prosecution investigators obtained a copy of his identity document during his interviews. The Prosecution is therefore not prejudiced by its admission.

(xix) Recently Disclosed Documents Concerning Witness Expenses, Correspondence between Witnesses and the Prosecution, and the Identity of P169

29. Documents number 37 to 47 satisfy the three step test for admissibility.

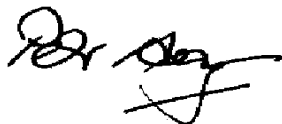
30. The Chamber is currently seized of issues concerning alleged witness subordination, which has occurred in exchange for alleged promises relating to witness expenses. The documents, which details these witnesses expenses, are of

key importance to any judicial determination as to whether the witnesses' decision to testify before the Court and the content of their testimony might have been influenced by an expectation that their cooperation would result in the payment of certain sums. In particular, the sums claimed by the witnesses concern the credibility insofar as they may have denied receiving any form of assistance (negligible or otherwise), or if the amounts claimed were not objectively justified (in which case, they would be more properly characterised as a payment rather than an expense). The documents were issued by the Prosecution contemporaneously and signed by the witnesses and Prosecution staff. The Prosecution has not suggested that they are inaccurate or lacking in probative value. The Defence were not in a position to tender these documents through the witnesses in question due to the fact that the Prosecution had refused to disclose them at that juncture, and the Chamber rejected the Defence request to recall the witnesses. Since the Prosecution has been aware of their contents at all relevant times, their admission at this juncture causes no prejudice to the Prosecution.

31. The same reasoning applies to the correspondence between the Prosecution and the witnesses in question, as recorded in the Investigator's reports. The correspondence touches directly on the issue of whether the witnesses perceived their entitlement to expenses to be linked to the Prosecution (rather than a neutral service provider). The contents of this correspondence provides important contextual information concerning contacts between witnesses themselves (and the Prosecution's knowledge of such contacts), and the existence or not for an objective justification for expenses (as opposed to general witness dissatisfaction being the trigger for further payments). For example, inferences can be drawn from the fact that the Prosecution were unable to contact witnesses on the mobile phones provided by the Prosecution to the witnesses. The investigators in question participated directly in the communications, and recorded them contemporaneously. The Prosecution has not suggested that they are inaccurate or that they do not reflect the contents of these communications.

32. Finally, the Defence notes that admission of such documents falls squarely within the parameters of ICC jurisprudence. For example, Trial Chamber I decided in the Lubanga case to admit emails between the Prosecution and witnesses, Prosecution expenses documents concerning witnesses and intermediaries, information extracted from the Prosecution witness contacts management system, and identity documents of witnesses, on the grounds that the documents were relevant to issues pertaining to possible collusion and subordination, and, having been authored by the Prosecution, had probative value (ICC-01/04-01/06-2664-Red). The Chamber further ruled that in light of the relevance of the documents, they should be admitted notwithstanding that they were 'internal work product' of the Prosecution (para. 58).

The whole respectfully submitted.



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The Hague, The Netherlands
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