



Original: English

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

Date: 16/09/2014

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 Submissions on the “Prosecution’s Information to Trial Chamber II on
issues involving witness CAR-OTP-PPPP-0169’, 1 September 2014, ICC-01/05-
01/08- 3138-Conf-Exp**

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. SUBMISSIONS

1. Trials before the International Criminal Court must be conducted in accordance with the principal of open justice.

2. On 9 September 2014, the Defence wrote to the Chief Prosecutor concerning P-169's Letter of 5 August. The Defence asked, *inter alia*, 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."¹ Critically, the Defence signalled its intention to seize the Chamber on this issue.

3. Rather than responding to the Defence, the Prosecution instead filed an *ex parte* motion to the Trial Chamber alleging that it was in possession of information concerning the "possible impetus" for the said letter and, accordingly, the credibility of its content.² If this is correct, the Prosecution is in breach of its disclosure obligations under the Statute and Rules, and in breach of Chapter 3, Section 3 of the Code of Conduct for the Office of the Prosecutor.

4. The Prosecution's *ex parte* filing contains a number of misstatements. The Letter of 5 August is referred to as P-169's "third letter",³ when it is his fourth.⁴ It discusses the possibility of the Chamber admitting the previous letters,⁵ when in fact they are already in evidence.⁶

5. What is more concerning, however, is that the Prosecution's recourse to *ex parte* filings allowed it to provide different information to the Defence and to the

¹ ICC-01/05-01/08-3139-Conf-AnxA.

² ICC-01/05-01/08-3138-Conf-Red, para. 15.

³ ICC-01/05-01/08-3138-Conf-Red, para. 10.

⁴ ICC-01/05-01/08-1660-Conf-Anx1-Red; ICC-01/05-01/08-2827-Conf-Red-AnxA; ICC-01/05-01/08-2827-Conf-Red-AnxB; CAR-OTP-0083-1212 to CAR-OTP-0083-1214.

⁵ ICC-01/05-01/08-3138-Conf-Red, para. 21(c): "should the Chamber be inclined to admit any or all of P169's letters".

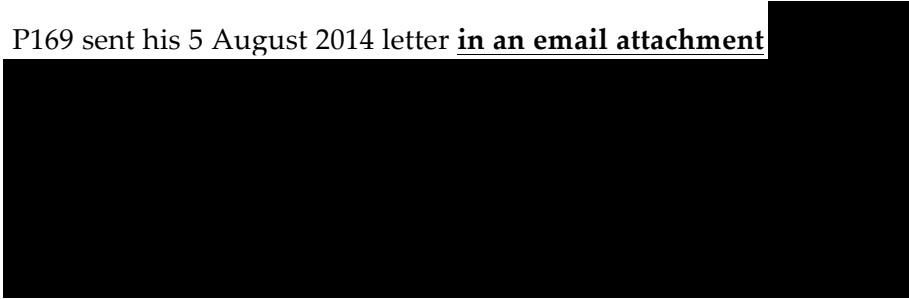
⁶ EVD-T-D04-00057/CAR-OTP-0072-0504_R01; EVD-T-D04-00056/ CAR-OTP-0072-0508_R01.

Trial Chamber. In its letter of 9 September 2014, the Defence specifically noted “the absence of disclosure of any covering email.”⁷ The Senior Trial Attorney, Mr. Badibanga, responded on 10 September that the Prosecution received the Letter of 5 August from VWU, and that:⁸

“no covering email was transmitted to the Prosecution.”

6. However, the Prosecution revealed to the Trial Chamber (albeit in a filing which the Defence was never supposed to see), that it had full knowledge of P-169’s covering email:⁹

P169 sent his 5 August 2014 letter in an email attachment



[REDACTED].

7. Also difficult to reconcile are Mr. Badibanga’s assertion to the Defence that the Letter of 5 August 2014 is “entirely untruthful”,¹⁰ and the infinitely more nuanced assertion to the Trial Chamber that “the Prosecution has evidence which bears directly on the possible impetus for P169’s 5 August 2014 letter, which emerges as a result of its Article 70 investigation”.¹¹ Indeed the latter is so enigmatic as to be almost devoid of meaning, and may signify little more than that P-169 may have purloined certain legal terms of art from the language of the publicly available material in the Article 70 case.

⁷ ICC-01/05-01/08-3139-Conf-AnxA.

⁸ ICC-01/05-01/08-3139-Conf-AnxB.

⁹ ICC-01/05-01/08-3138-Conf-Red, para.11.

¹⁰ ICC-01/05-01/08-3139-Conf-AnxB.

¹¹ ICC-01/05-01/08-3138-Conf-Red, para. 15.

8. On this point, it is of great concern to the Defence that the Prosecution feels in a position to approach the Trial Chamber *ex parte* and allude to “evidence” which, although inadmissible, apparently may offer minimal support to the Prosecution’s position concerning P-169. The Defence is obviously in no position to comment on such “evidence”, never having seen it. However, making vague and self-serving allusions to the Trial Chamber, while deliberately excluding the Defence from exercising Mr. Bemba’s right to challenge the case against him, falls far outside any acceptable form of adversarial procedure. The Defence also notes the extremely advanced stage of the proceedings; the Trial Chamber is effectively in deliberation and yet the Prosecution purports to make *ex parte* submissions to it on matters of witness credibility. Trials must be conducted in the open. “Evidence” must be open to challenge. An accused should not be invited only to participate in his trial on a sporadic basis. The Prosecution and the Trial Chamber may not engage in the *ex parte* assessment of “evidence” which bears on central questions to the case.

9. These concerns aside, the *ex parte* submissions also contain some hugely significant concessions. The Prosecution submits, firstly, that the letter may be admissible on the issue of P-169’s credibility;¹² and, secondly, that “the Chamber may alternatively see fit to recall the witness. This would minimally give the parties and the Chamber an opportunity to address their respective concerns regarding P169’s testimony in light of his subsequent behaviour.”¹³ In fact, the *ex parte* submissions read as a whole provide strong support for the case for recall.

10. Mr. Bemba has been in prison now for six years. The trial ran for over three years. A document which has the ability to dramatically alter the landscape of the proceedings and the reliability of the Prosecution case cannot simply be dismissed out of hand. The Defence’s primary submission remains as stated in its filing 3139-

¹² ICC-01/05-01/08-3138-Conf-Red, para. 17.

¹³ ICC-01/05-01/08-3138-Conf-Red, para. 18.

Conf; that the Trial Chamber must disregard the testimony of P-169 and the witnesses who are ready to bring proof of their subornation. Absent an explicit finding, the Defence agrees with the Prosecution that recall of at least P-169 is the only course of action remaining, and repeats and relies on the relief as set out in filing 3139-Conf. Specifically, the Defence maintains its request to interview P-169 in advance of any recall.

11. Moreover, in light of the above, the Defence requests that the Trial Chamber:

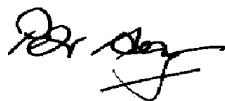
ORDER the Prosecution to disclose the information referred to in paragraph 15 of the Prosecution's *ex parte* filing;

ORDER the disclosure by either VWU or the Prosecution of the covering email referred to in paragraph 11 of the Prosecution's *ex parte* filing;

ORDER the Prosecution to desist from filing any further *ex parte* motions or applications to the Trial Chamber; and

ORDER the re-classification as Confidential of all *ex parte* filings and annexed materials made hitherto.

The whole respectfully submitted.



Peter Haynes QC

Lead Counsel of Mr. Jean-Pierre Bemba

The Hague, The Netherlands

16 September 2014