



Original: English

No: ICC-01/05-01/13

Date: 27 June 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF *THE PROSECUTOR*
*v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU and NARCISSE ARIDO***

Public

**Request Seeking the Prosecution to Provide to the Kilolo Defence Specific
Information Relating to Its Reimbursement of Prosecution Witnesses**

Source: Defence for Aimé Kilolo Musamba

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Aimé Kilolo Musamba

Mr Ghislain Mabanga

Counsel for Jean-Pierre Bemba Gombo

Mr Nicholas Kaufman

Counsel for Jean-Jacques Mangenda Kabongo

Mr Jean Flamme

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Göran Sluiter

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. *Purpose:* This Request ("Request") is submitted by the Defence of Mr Aimé Kilolo Musamba ("Defence" and "Mr Kilolo" respectively) to the Single Judge pursuant to and in accordance with Articles 56(1)(b) and 57(3)(b) of the Rome Statute of the Court ("Statute"), respectfully requesting the Single Judge order the Office of the Prosecutor ("OTP") to provide to the Kilolo Defence information critical to its defence in relation to the monies expended by the OTP in relation to witnesses in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 ("Main Case").
2. *Structure:* This Request will dispense with the procedural posture of these present proceedings and will instead, at the outset, address the relevance and legal reasoning supporting the Request (II) before articulating the limited and specific questions to which the Defence seeks the Prosecution's responses (III).

II. LEGAL REASONING SUPPORTING THE REQUEST

3. The limited information requested by the Defence from the Prosecution as regards the Prosecution's reimbursement of and expenditures in relation to Prosecution witnesses is of utmost importance to the proper and adequate preparation of Mr Kilolo's defence. Without such information, the Defence contends it is unable to properly realise its defence strategy and provide a proper defence for Mr Kilolo, thus calling into question the principle of due process.
4. The right to a fair trial and public hearing, as provided for in Article 67(1) of the Statute, is a minimum guarantee necessary for the proper administration of justice and may not be abandoned at any point in the judicial proceedings. Similarly, the corollary principle of due process and the ability to properly challenge the legality of one's detention cannot be countervailed under any circumstances.

5. An integral element of the right to a fair trial is the principle of equality of arms, by which, as defined by the European Court of Human Rights, each party must be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent.¹ The principle is intended to ensure the inherent equality between the parties to the proceedings, guaranteeing due process and fairness through ensuring that one party is not subject to a prejudice on the part of the other. This includes, but is not limited to, for instance allocating appropriate time for submitting comments on the adversary's observations, or, as in the present case, the access to information or evidence relevant to the current proceedings, ensuring transparency and fairness throughout the trial.
6. Indeed, the ECtHR reiterated that the principle of equality of arms also encompasses the idea that "each party must be given the opportunity to *have knowledge of and comment on the observations filed or evidence adduced by the other party*."² As such, in order to safeguard against a violation of the fundamental principle of equality of arms between the two adversarial parties, and thus guaranteeing the right to a fair trial, it is *absolutely critical* for both parties to be granted equal access to all relevant information to secure transparency, particularly in light of the fact that it could prove to be either incriminatory or exculpatory, thus elevating its status to being potentially decisive in the entire case.
7. The Rome Statute similarly guarantees these rights in a number of provisions and in a variety of ways. Article 57(3), for example, relates to the Pre-Trial Chamber's power to, "[u]pon the request of a person who has been arrested or has appeared pursuant to summons under article 58, *issue such orders...as may be necessary to*

¹ European Court of Human Rights, *Niderost-Huber v Switzerland*, App. No. 18990/91, 18 February 1997, para 23 ; *Maravić Markeš v. Croatia*, ECtHR, App. No. 70923/11, 9 January 2014, para 46; *Wynen v. Belgium*, ECtHR, App. No. 32576/96, 5 November 2002, para. 32; *Kress v France*, ECtHR, App. No. 39594/98, 7 June 2001, para. 72.

² *Wynen v. Belgium*, ECtHR, App. No. 32576/96, 5 November 2002, para. 32; *Kress v France*, ECtHR, App. No. 39594/98, 7 June 2001, para. 74.

assist the person in the preparation of his or her defence.”³ Indeed, the Pre-trial Chamber is afforded the ability to “take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence”⁴, including through the collection or preservation of evidence.⁵ Further, per Rule 116(1) of the Rules of Procedure and Evidence, “[t]he Pre-Trial Chamber *shall* issue an order...under article 57(3)(b) where it is satisfied (a) [t]hat *such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence.*”⁶

8. The broad access to information possessed by the Prosecution, a liberty unfortunately not similarly enjoyed by the Defence, whose access to information is limited in every conceivable way, leads the Defence to stipulate that the fairness of these proceedings and the sound administration of justice necessitates that the Prosecution furnish to the Defence the information requested herein. Indeed, the Defence’s request is extremely tailored and limited, and only seeks that information absolutely critical to its defence strategy and, consequently, to the proper resolution of this case. This request for information is not a legal fishing expedition but rather a serious attempt to procure information that will allow this Chamber to better contextualize typical witness reimbursement practices at this Court, a feature critical to the Defence’s strategy. Indeed, the Defence takes seriously the unfounded allegations levied against it by the Prosecution, and seeks to defend itself by requesting a minimum level of information so as to present to the Court a better contextualized factual scenario as regards witness reimbursement at this Court.

³ Rome Statute, Art. 57(3) (emphasis added).

⁴ Rome Statute, Article 56(1)(b).

⁵ Rome Statute, Art. 56(2)(f).

⁶ International Criminal Court, Rules of Procedure and Evidence, Rule 116(1).

III. THE REQUEST

9. The Defence respectfully requests the Single Judge order the OTP to provide to the Kilolo Defence with the utmost haste and urgency the information requested herein. Specifically, the Defence requests information as regards monies expended by the OTP in relation to its witnesses in the Main Case, namely: (i) monies paid to expert witnesses as remuneration, (ii) monies given directly by the OTP to any and all witnesses during the course of the OTP's on-the-ground investigation, and (iii) monies spent in relation to and on behalf of all Prosecution witnesses but which were not tendered directly to the witnesses.
10. Such information is critical to the defence of Mr Kilolo in the upcoming confirmation of charges, wherein Mr Kilolo is charged by the Prosecution with witness corruption on the basis of money transfers effectuated by Mr Kilolo to certain witnesses. However, the Defence contends that legitimate reasons exist for such money transfers, which do *not* include or comprise witness corruption. Indeed, the Defence stipulates that the effectuation of such money transfers and the payment of certain monies to witnesses is accepted practice within this Court, by both the defence and the Prosecution. To that end, in seeking to bring to this Court's attention the practice surrounding the reimbursement of witnesses, the Defence today seeks information with regard to the specific amounts paid by the Prosecution to its own witnesses during the course of the Main Case.
11. In the context of the present case, and in light of the relevant Defence strategy against the OTP's allegations of witness corruption, the Kilolo Defence finds it necessary to explicate certain accepted procedures and processes as regarding the reimbursement of witnesses at the Court, which is of great bearing and particular relevance in the present case. For instance, witnesses testifying on behalf of an adversarial party in a case before this Court are entitled to the reimbursement of expenses borne in connection with the provision of such testimonies. Specifically, the witnesses' travel, accommodation, and meal costs in connection with the investigation are often funded by the party seeking such testimony. Further, the

remuneration of expert witnesses for their research, skills, expertise and work product is standard practice at this Court.

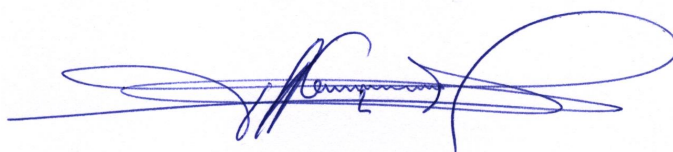
12. Such were the circumstances of the Main Case, in which both the Prosecution and the Defence teams reimbursed and remunerated their witnesses for the testimony provided. Mr Kilolo, the then Lead Counsel for Mr Bemba, was tasked with reimbursing witnesses for expenses they had borne in connection with the provision of their testimony and with subsequently remunerating expert witnesses for their reports. This was similarly the case with the Prosecution and its remuneration of witnesses. To that end, and in connection with its present defence strategy, the Kilolo Defence requests from the Prosecution the following information, which the Kilolo Defence emphasizes is not only *critical* to its defence in terms of negating the current allegations of witness corruption, but which also proves necessary in terms of contextualizing the circumstances of the Main Case on both the part of the Prosecution and the Defence.
13. In the first place, the Defence notes that the Prosecution called to the stand three expert witnesses, including a military expert, a linguistic expert, and an expert on gender crimes. Each expert witness was necessarily remunerated for his or her research, work product, testimony and time. The Defence requests the specific and total amounts of remuneration of each Prosecution expert witness, i.e., the exact and total amount paid by the Prosecution to each witness.
14. The Defence notes that this is particularly critical in this case, as Mr Kilolo is charged with corruptly influencing witnesses on the basis of monies paid by Mr Kilolo to certain witnesses, of whom two were expert witnesses. In the context of showing that the remuneration of such witnesses is not only acceptable, but also clearly legitimate, the Defence feels it is necessary to demonstrate to the Court the same practice as employed by the Prosecution and the specific amounts related thereto.
15. Secondly, the Prosecution reimbursed its witnesses throughout the course of its on-the-ground investigation relating to the Main Case. As the provisions of funds from Mr Kilolo to certain witnesses form the basis of the present allegations

against Mr Kilolo, the Defence considers that information as regards the exact amount and total sum of all monies directly tendered by the Prosecution to their witnesses during the course of the on-the-ground investigation will prove invaluable to the Defence team. To this end, the Defence requests not only a list of all monies directly tendered to the witnesses in total, but also a purpose-by-purpose breakdown of the monies paid to each witness, which details, *inter alia*, not only the sum tendered to each witness, but on what day such sum was tendered and for what purpose.

16. Moreover, the Defence acknowledges that not all payments to witnesses occur through direct exchanges. Indeed, monies may be expended in connection with or on behalf of witnesses without ever being given *directly* to the witness himself or herself. The Defence notes that the Prosecution called forty witnesses in the Main Case, all of whom were necessarily compensated in some form, be it through direct or indirect tendering of funds, goods, or even services, such as the booking of flights and hotels. As such, the Defence requests the Prosecution provide to the Defence information concerning the total monies spent by the Prosecution in connection with and on behalf of any witnesses during the course of its investigation and prosecution in the Main Case. Specifically, the Defence requests that the Single Judge order the Prosecution to furnish to the Defence a witness-by-witness breakdown of all monies spent and the purposes for which such monies were expended. Such a breakdown of the funds disbursed by the Prosecution in relation to the reimbursement and remuneration of witnesses is of particular importance and relevance in a case where the Prosecution has alleged witness corruption on the basis of similar money transfers and remuneration. As such, the Defence highlights that the requested information is of critical importance not only in the proper preparation of Mr Kilolo's defence in refuting allegations of witness corruption, but also in ensuring the transparency and legitimacy of the current proceedings and of this Court's practice as a whole.

IV. REQUESTED RELIEF

1. Emphasizing the urgent nature of the aforementioned requests, the Defence for Mr Kilolo respectfully requests that the Single Judge order the immediate provision by the OTP to the Kilolo Defence of the following information no later than 4 July 2014:
 - Sums spent, individually and in total, by the Prosecution in remunerating its expert witnesses in the Main Case;
 - Sums *directly* disbursed by the Prosecution to all of its witnesses during the course of its on-the-ground investigations, including not only the total sums provided but the exact amounts and purpose of such payments; and
 - All sums spent on behalf of or in connection with all witnesses on the Main Case, including not only the total sums provided but the exact amount and purposes of such payments.



Ghislain M. Mabanga
Lead Counsel for Mr. Aimé Kilolo Musamba

Dated this 27 June 2014,
At The Hague, The Netherlands