

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13

Date: 25 June 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Confidential Document

**Prosecution's Response to the Kilolo Defence's Request for Disclosure of
Information related to P-0169**

Source: The Office of the Prosecutor

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

Court to:

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Kilolo Defence's request¹ for the disclosure of material related to P-0169, a Prosecution witness in the Main Case.² The Request fails to establish the materiality of the information sought and should be dismissed.

2. However, if the Trial Chamber VII ("Chamber") considers it necessary, the Prosecution can provide the material to the Chamber *ex parte*, for the Chamber to determine whether disclosure is appropriate.

II. Confidentiality

3. This submission is filed as "Confidential" as it responds to a filing so designated. The Prosecution has no objection to this filing being reclassified as "public".

III. Background

4. On 18 May 2015, the Defence for Kilolo requested the Prosecution to disclose information related to P-0169, including certain e-mails sent to P-0169; the statements of 22 Prosecution witnesses "cited" by P-0169; and payments made to P-0169.³ On 27 May 2015, the Prosecution responded that there were no such e-mails, and that the Defence had failed to establish a *prima facie* basis for the remaining information.⁴

¹ Echoed by Mangenda (ICC-01/05-01/13-1030-Conf) and Babala (ICC-01/05-01/13-1031-Conf).

² ICC-01/05-01/13-1023-Conf ("Request").

³ ICC-01/05-01/13-1023-Conf-AnxA, pp.2-3.

⁴ ICC-01/05-01/13-1023-Conf-AnxA, p.4.

5. On 8 June 2015, the Defence for Kilolo reiterated its request, to which the Prosecution responded in the same vein on 11 June 2015.

6. The Defence of Kilolo now requests disclosure of the payments made to P-0169.⁵ The request has already been made before, and rejected by, the Single Judge on two occasions.⁶

IV. Submissions

A. The Request fails to establish the materiality of the information

7. As already mentioned in previous filings,⁷ the Request fails to establish a *prima facie* basis for the information sought. Information related to witness expenses in a separate case has no evidentiary value in a subsequent case absent a specific factual or legal nexus to a contestable issue. The Appeals Chamber has held that “the right to disclosure is not unlimited” and that the application of rule 77 depends on “the specific circumstances of the case”.⁸ Here, the particular information sought is immaterial to the preparation of the Defence.

⁵ Request, para.17.

⁶ By the Kilolo Defence: On 27 June 2014, the Kilolo Defence requested the disclosure of information related to reimbursements of Prosecution witnesses in the Main case: ICC-01/05-01/13-520. After a proposal from the Prosecution to that effect (ICC-01/05-01/13-542), the Single Judge asked the Prosecution to submit the material to the Single Judge for review in order to determine its materiality (ICC-01/05-01/13-591). The Prosecution provided the information (ICC-01/05-01/13-609), after which the Single Judge rejected the request, the issue having become moot for the purposes of that phase of the proceedings (ICC-01/05-01/13-753).

By the Bemba Defence: On 17 October 2014, the Bemba Defence requested the disclosure to the other accused of information related to monies advanced to P-0169 or his family (ICC-01/05-01/13-698-Exp). The Prosecution provided the information to the Single Judge (ICC-01/05-01/13-716-Conf-Exp), after which the Single Judge rejected the request, the issue having become moot for the purposes of that phase of the proceedings (ICC-01/05-01/13-753).

⁷ ICC-01/05-01/13-542 and ICC-01/05-01/13-716-Conf-Exp.

⁸ ICC-02/05-03/09-501, para.39.

8. *First*, P-0169, for whom the Defence seeks expense information, is not a witness in this case. Accordingly, any alleged payments received by P-0169 have no bearing on the factual issues in this case. Further, as P-0169 is not a witness in the present case, his credibility is not at issue.

9. *Second*, the purpose for which the Defence seeks the information (namely, to inform the Chamber of the Parties' general practices in the Main case in respect of payments to witnesses)⁹, is not a relevant consideration. The conduct at issue here is not the payment of Defence witnesses in the abstract, but their payment to corruptly influence their evidence before the Court. The Prosecution's provision for witness expenses in respect of a particular witness in a separate case cannot logically determine whether the Accused corruptly paid witnesses, as alleged in this case. It is simply irrelevant.

10. Contrary to the Defence's claim,¹⁰ the information sought does not contextualise the circumstances of witness payments in the Main Case. No matter what reimbursement practice the Main Case employed, or that of any other case before this Court, it is clear that paying witnesses to influence their testimony is proscribed. Thus, information establishing the bounds of witness payment practises before the Court has no bearing on any material issue in this case.

11. Plainly, the Defence seeks to be able to draw a false comparison between payments allegedly made by the Prosecution to its witnesses in the Main Case, and those made by the Defence. However, first, no such comparison exists in fact and the Request fails to advance any such parallel in terms of the charged offences; second, even if this were so, it would at best amount to a *tu quoque* defence and thus

⁹ Request, paras.21-23.

¹⁰ Request, paras.21-23.

irrelevant to addressing the substantive charges in the Article 70 case. As such, the Request fails to meet the requirements for disclosure pursuant to rule 77.

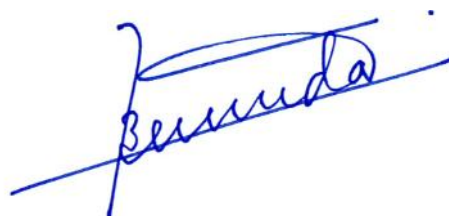
B. If necessary the Prosecution can provide the information to the Chamber *ex parte* for review

12. Notwithstanding the above, should the Chamber consider it necessary, the Prosecution can provide the Chamber with the requested information on an *ex parte* basis, to assist the Chamber in taking an informed decision about whether disclosure is appropriate.

13. If the Chamber requires the disclosure of the material, the Prosecution will petition Trial Chamber III for the necessary authorisation (as P-0169 is a protected witness in the Main case) and to implement any necessary protective measures.

V. Requested Relief

14. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the Request. Should the Chamber deem it necessary, the Prosecution can provide the Chamber with the information sought *ex parte* to determine whether disclosure is appropriate.



Fatou Bensouda, Prosecutor

Dated this 25th Day of June 2015
At The Hague, The Netherlands