

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 30/06/2015

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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Confidential

Confidential Redacted Version of "Defence Response to Filing 1023-Conf"

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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Introduction

1. The Article 70 case did not emerge from a vacuum; it arose from the Main Case, and its content, contours and nuances are very much shaped by the procedural, legal and substantive context of the Main Case.
2. In a case concerning allegations of 'false' testimony, it is questionable as to whether the Defence teams can participate effectively without full access to the evidence and filings, which define the nature and scope of the 'truth' in that case.
3. Apart from this general presumption of relevance, there are concrete grounds for disclosing all filings, transcripts and evidence pertaining to P-169, and the witnesses connected to his correspondence/threatening entreaties.
4. This is reflected by the instances in Case No. ICC-01/05-01/08 in which Prosecution witnesses:
 - i. received substantial sums of money directly from the Prosecution, without prior authorisation from the VWU, and without any direct correlation to logistical expenses associated with being interviewed by the Prosecution;
 - ii. denied, whilst under oath, receiving money from the Prosecution, notwithstanding the fact that they did;
 - iii. communicated with other witnesses and persons connected to the case in relation to the substance of their testimony both before, during and after their testimony;
 - iv. denied liaising with other witnesses under oath, despite evidence to the contrary;

- v. demanded financial and logistical assistance in exchange for their testimony/or in exchange for not recanting their testimony;
- vi. conceded that they had fabricated false information concerning threats emanating from the accused/Defence, whilst under oath; and
- vii. acknowledged that there was a scheme to falsify victim applications (which witnesses had participated in) in order to obtain greater financial rewards if the accused was convicted.

5. When confronted with such incidents, the Prosecution defended this conduct, and maintained its reliance on these witnesses as witnesses of truth.

6. The standards set by the Prosecution for its own conduct and any related decisions from Trial Chamber III concerning the above conduct of Prosecution witnesses/intermediaries are relevant to the legal standards, which should apply to the conduct of Defence witnesses/intermediaries/Defence Counsel in this particular case.

7. On a broader level, this information is also relevant to the context in which the alleged conduct took place, and the expectations and conduct of witnesses who are located in this context.

8. Finally, both the Independent Counsel and the Prosecution sought to link P-169's conduct and letters to the Court to Article 70 case. The Prosecution has also employed false allegations from P-169 regarding 'threats' from the MLC in order to perpetuate an erroneous perception that Mr. Bemba, his former Defence, and his supporters are a threat to Prosecution witnesses. This has implications not just for Mr. Bemba himself, but also his former Counsel, and co-defendants linked to the MLC.

9. All Defence teams should therefore be entitled to access information, which reveals the falsity of these accusations.

10. For these reasons, the Defence for Mr. Jean-Pierre Bemba supports the 'Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d'informations relatives au témoin de l'Accusation 169' (the «Requested Information»¹).

11. The current filing has been submitted on a confidential *ex parte* (Prosecution, Bemba Defence only) basis due to the fact that it references confidential filings from Case No. ICC-01/05-01/08. The Defence will file a confidential redacted version forthwith. Should the initial request be reclassified or refiled on a public redacted basis, the Defence would also file a public redacted version of the current filing.

Submissions

12. The Requested Information contains a wealth of material relating to conduct, which mirrors or is otherwise relevant to the allegations in the Article 70 case.

13. Access to the Requested Information could assist the Defence to develop arguments in relation to:

- i. what legal or factual inferences can be drawn from such conduct;
- ii. the applicable standards for regulating such conduct;
- iii. the context in which such conduct occurs; and
- iv. the veracity of allegations concerning threats or intimidating conduct on the part of the Defence/Mr. Bemba/the MLC.

¹ ICC-01/05-01/13-1023-Conf.

14. The Prosecution, and not the Defence, should request Trial Chamber III to reclassify the Requested Information because it is both duty-bound and better placed to do so.

The content of the Requested Information relates to conduct, which is relevant to the allegations in the Article 70 case

15. The Prosecution has advanced the position in this case that adverse inferences can be drawn from:²

- i. post-testimonial contacts between the Defence and its witnesses, or the frequency of any such contacts in general;
- ii. contacts between witnesses, or with intermediaries;
- iii. direct payments from the Defence to witnesses;
- iv. testimonial omissions regarding payments or contacts;
- v. allegations that the Defence provided witnesses with mobile phones; and
- vi. allegations that witnesses were promised asylum or relocation exchange for testimony.

16. The Prosecution has also sought to have the Court impose a strict standard of liability on the Defence as concerns the use or reliance on witness testimony that might be afflicted by any of the above issues.

17. The following incidents reflect conduct, which is relevant to the Prosecution's position.³

² ICC-01/05-01/13-526-Conf-AnxB1, paras. 33, 40, 41, 47, 56, 61, 67, 68, 69, 74; ICC-01/05-01/13-597-Conf-AnxB, paras. 34-37, 39, 71; ICC-01/05-01/08-2910; ICC-01/05-01/08-3250; ICC-01/05-01/13-139-Conf-AnxA; ICC-01/05-01/13-172-Conf

³ The Defence has not had sufficient time to elaborate, for the purposes of this filing, on all aspects of the Requested Information that might be relevant to the Article 70 case. The information in this filing should therefore not be considered to constitute an exhaustive account or summary of all the filings

18. P-169 was a prosecution witness in Case No. ICC-01/05-01/08. [REDACTED].⁴ During his testimony in 2011, P-169 acknowledged that he had been “corrupted” through the receipt of money from [REDACTED],⁵ [REDACTED],⁶ in exchange for providing information against the MLC. [REDACTED].⁷

19. [REDACTED].⁸

20. [REDACTED].⁹ No statements or notes were disclosed in relation to this meeting. When questioned about the nature of the meeting, P-169 claimed that Mr. Badibanga had travelled to Bangui in order to ‘familiarise’ P-169 with the procedures for testifying prior to his testimony.¹⁰

21. Notwithstanding the fact that he received payments directly from the Prosecution on several occasions, when P-169 first testified in the Main Case, he claimed that:

“Before coming to testify, I did not receive any financial assistance at all from the Prosecutor.”¹¹

22. [REDACTED] ¹² [REDACTED],¹³ [REDACTED].¹⁴

and exhibits that could be considered to be relevant to the Article 70 case, or fall within the scope of the Requested Information.

⁴ [REDACTED].

⁵ ICC-01/05-01/08-T-137-Conf-ENG-ET, pp.12, 36.

⁶ ICC-01/05-01/08-T-145-Conf-ENG-ET, p.44. See also ICC-01/04-01/06-2842, at paras. 302, 368, 374.

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ ICC-01/05-01/08-T-362-CONF-ENG, p. 42, lines 6-12.

¹¹ ICC-01/05-01/08-T-361-CONF-ENG ET, 22 October 2014, p.32, lines 22 to 23.

¹² ICC-01/05-01/08-T-154-Conf-ENG-ET, p.3, lines 13-14; ICC-01/05-01/08-T-157-Conf-ENG-ET, p.30, lines 1-6, p.31, lines 22-25; ICC-01/05-01/08-T-157-Conf-ENG-ET, p.53, line 10-p.54, line 3; [REDACTED].

¹³ ICC-01/05-01/08-T-361-Conf-Eng-ET, p.11, lines 12-13.

¹⁴ [REDACTED].

23. Following his testimony, P-169 sent a series of threatening missives, which had the objective of obtaining more money. [REDACTED].

24. [REDACTED].¹⁵ [REDACTED] ¹⁶ [REDACTED],¹⁷ [REDACTED].¹⁸
[REDACTED],¹⁹ [REDACTED].

25. [REDACTED],²⁰ [REDACTED].

26. [REDACTED].²¹

27. [REDACTED];²² [REDACTED].

28. [REDACTED].²³ [REDACTED].²⁴ [REDACTED].²⁵

29. [REDACTED]. ²⁶ [REDACTED].

30. [REDACTED]. ²⁷ [REDACTED].

31. [REDACTED].²⁸

32. Despite knowing that P-169 was someone who had conceded in his testimony that he could be 'corrupted' by money, [REDACTED].²⁹ [REDACTED].³⁰

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED], [REDACTED], [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ICC-01/05-01/08-T-361-Conf-Eng-ET, p.55, lines 15-16.

²⁸ [REDACTED].

33. [REDACTED].³¹

34. [REDACTED].³²

35. [REDACTED].³³

36. [REDACTED].³⁴

37. However, in a confidential *ex parte* submission to the Trial Chamber, the Prosecution acknowledged that it had engaged in email correspondence with P-169 on multiple occasions, including from a special non-icc email account.³⁵ [REDACTED].³⁶

38. The Trial Chamber ordered P-169's recall in order to allow the parties to question him in relation to these issues. [REDACTED]. On this date, despite knowing ICC protocols and the contact details of VWU personnel, P-169 called the Prosecution Senior Trial Attorney, Mr. Badibanga, and not a VWU protection officer.³⁷

39. During his recall, P-169 testified that he was aware of the procedure used to pay different witnesses.³⁸ [REDACTED].³⁹ [REDACTED].⁴⁰

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ "Yes, I remember him. He's an investigator. He was one of the ones who came to carry out the investigation, yes. He gave **everyone** who was invited some money to cover transportation costs, round-trip, and that's what happened at first." (emphasis added) T-362-Conf-ENG-ET, p.35, lines 22-24.

40. [REDACTED].⁴¹

41. During his testimony, P-169 sought to attribute blame to [REDACTED] as concerns the scheme to lobby the Court for more money.⁴² [REDACTED].⁴³ [REDACTED].⁴⁴ [REDACTED].⁴⁵

42. [REDACTED].

43. 'Emmanuel' (who is a person that the Prosecution has failed to positively identify or investigate) was involved in the fabrication of false evidence. During the trial, P-73 testified that his testimony had been suborned by a person called Emmanuel,⁴⁶ who had also assisted his neighbour P-42. [REDACTED].⁴⁷

44. The close links between P-42 and P-73 were also evidenced by the fact that the Prosecution used P42's telephone to communicate with P-73 - a conversation which occurred at P-42's house.⁴⁸ P-42 and P-73 also discussed the contents of their interviews with the Prosecution: P-73 told P-42 the questions that were put to him, and what P-73's answers had been.⁴⁹ P-73 also informed P-42 of his belief that the Banyamulengue were responsible for pillaging his house, beating him up, and raping his daughter.⁵⁰ In turn, P-73 testified that his group of neighbours (which

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² ICC-01/05-01/08-T-361-Conf-ENG-ET, p.55, lines 7-10.

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ "As you know, it's always good to tell the truth. When I told that person this, he told me, "But listen. People are mentioning large sums of money, and you, you are just mentioning just small amounts of money. You don't want to eat of the cake?"; P-73, ICC-01/05-01/08-T-73, p.19, lines 23-35.

⁴⁷ ICC-01/05-01/08-T-67-Conf-ENG-ET, p.1

⁴⁸ P-42, ICC-01/05-01/08-T-66, p.39, lines 8-25.

⁴⁹ P-42, ICC-01/05-01/08-T-66, p.48, lines 1-17. See also p.49, lines 3-12 where P-42 further confirms his awareness of the details of P-73's statement given to the Prosecution.

⁵⁰ P-42, ICC-01/05-01/08-T-69, p.45, lines 12-17.

included P-42) colluded in relation to the content of their testimony concerning the date on which the attackers entered PK 12.⁵¹

45. [REDACTED].⁵² [REDACTED].⁵³

46. In response to Defence submissions that the above incidents might be indicia of collusion, corruption, or at the very least, unreliable testimony, the Prosecution steadfastly claimed that these incidents did not undermine the reliability or credibility of the witnesses in question.

47. In particular, the Prosecution argued that:

[REDACTED].⁵⁴

[REDACTED].⁵⁵

[...]

[REDACTED].⁵⁶

[...]

[REDACTED].⁵⁷

⁵¹ And with our neighbours, we said to one another, "Those people who listen to us –don't–be careful. Don't make any mistakes about dates." That's what we said to one another. So that date is the one we retained as being a lesson, as it were." P-73, ICC-01/05-01/08-T-72, p.20, lines 8-11; "You see, it's, well, one of [REDACTED] who was interviewed by the investigator. I was invited as well. There were also other people who were also interviewed. On reflection I thought –I said, well- to myself – we have to understand each other with regards to the dates. It's necessary to note them down. Because we gave these dates, it's necessary to maintain this date because we've already stated this. We therefore came to an agreement and we noted down these dates. It could be the case that there are investigations which lead to a trial, and if we were asked on what date something occurred, we would refer to the dates that we'd taken, and that's the reason why I stated that we had decided to take those dates." P- 73, ICC-01/05-01/08-T-73, p.36, lines 12-21.

⁵²ICC-01/05-01/08-T-361-Conf-Eng-ET, p.57, lines 6-10. ICC-01/05-01/08-T-361-Conf-Eng-ET, p.68, lines 22-25; ICC-01/05-01/08-T-362-Conf-ENG-ET, p.3, line 25 –p.4, line 14. [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

48. In subsequently filed submissions arising out of the recall of P-169, the Prosecution averred that the post-testimonial conduct of a witness is irrelevant to the credibility of the witness or the witness's prior testimony.⁵⁸ The Prosecution further advanced the position that it must be expected and accepted that witnesses may lie about certain aspects of their testimony; this does not, however, impugn the overall reliability or credibility of the witness's testimony:⁵⁹

[REDACTED].

The Requested Information is relevant to legal and factual standards which should apply to the Article 70 allegations, provides context of the circumstances of the Main Case, and may be relevant to Prosecution allegations concerning improper conduct on the part of Mr. Bemba, the Defence or persons linked to the MLC

49. P-169 (and related witnesses) and the witnesses, who are the subject of the 70 case, appeared in the same case. Equality of arms dictates equality of treatment for witnesses, irrespective as to for whom who the witnesses appeared. This is reflected in Article 67(1)(e) of the Statute, which provides that the Defence have the right to call and obtain the attendance of witnesses under the same conditions as witnesses against them.

50. The Defence teams in the Article 70 case should therefore have full access to any legal or factual precedents, which concern the conduct of witnesses and parties in Case No. ICC-01/05-01/08.

51. Such access would allow the Defence to assess and contest the reasonableness of the Prosecution position in the Article 70 case.

⁵⁸ [REDACTED], ICC-01/05-01/08-3182-Conf-Corr, para. 1. [REDACTED]; ICC-01/05-01/08-3182-Conf-Corr, para. 24.

⁵⁹ ICC-01/05-01/08-3182-Conf-Corr, para. 25.

52. The above history concerning P-169 and accomplices, and the Prosecution's persistent defence of its actions, provides a useful comparison point regarding the reasonableness of such evidential conclusions.

53. Although there is no binding doctrine of legal precedent at the ICC, it is clearly unfair to apply a completely different legal standard to the conduct of witnesses and parties in the same case. The Defence therefore has a direct interest in accessing and analysing any conclusions adopted by the Trial Chamber in Case No. ICC-05/01-01/08 concerning the above conduct.

54. The Requested Information also provides important context regarding the expectations of witnesses, and manner in which they might frame these expectations and demands. The trajectory of the correspondence from P-169 reflects the growing awareness amongst CAR citizens of the nature and extent of entitlements which could be provided by the entities within the Court. It is emblematic of the general desire amongst CAR citizens to obtain asylum due to the instability in CAR and the region, and their 'grievance' if their applications were rejected.

55. Any interaction with witnesses – whether it stem from the Defence or the Prosecution – would have been affected by this context, the only difference being that the Prosecution team had a full array of services, sections and training to advise it in relation to the management of witnesses.

56. The Appeals Chamber has affirmed that contextual information and evidence regarding patterns of conduct by persons in the same area or situation can assist Defence preparation, as can information concerning violations committed by other persons in the same area.⁶⁰ The existence of a geographical, temporal or

⁶⁰ ICC-02/05-03/09-501, para. 38.

material overlap in cases has also constituted sufficient indicia of relevance at the ICTY.⁶¹

57. Access to the information would also facilitate the ability of the Defence to respond to allegations concerning threatening or intimidation behaviour from persons associated with the defendant,⁶² and to rebut any false perceptions that the defendant and Defence are a source of risk to Prosecution witnesses.

58. The Independent Counsel also transmitted (privileged) Defence communications regarding P-169 and his correspondence to the Prosecution in this case.⁶³ The Prosecution, in turn, relied on this information in order to advance its position in the Article 70 case,⁶⁴ and the Main Case.⁶⁵

59. The five Defence teams all have the right to access any information which might be relevant to the context of this communication, and the objective of any Defence investigations or actions that might have been triggered by disclosures in the Main Case concerning P-169.

⁶¹ Prosecutor v. Blaskic, IT-05-14-A, "Decision on Appellants Dario Kordic and Mario Cerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-public Post Appeal Pleadings and hearing Transcripts Filed in the Prosecutor v. Blaskic", 16 May 2002, para. 14; Prosecutor v. Kordic and Cerkez, IT-95-14/2-A, "Decision on Motion by Hadzihasanovic, Alagic and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordic and Cerkez Case, 24 January 2003, p. 4; Prosecutor v. M. Krajisnik, IT-00-39-A, "Decision on "Motion by Mico Stanisic for Access to All Confidential Materials in the Krajisnik Case", 21 February 2007, p. 4-5; Prosecutor v. Djordjevic, IT-05-87/1-PT, "Decision on Vlastimir Djordjevic's Motion for Access to Transcripts, Exhibits and Documents in Prosecutor v. Slobodan Milosevic, Case No. IT-02-54", 6 February 2008, para. 7

⁶² For example, ICC-01/05-01/13-985-Conf-Red, paras.31-33.

⁶³ ICC-01/05-01/13-421-Anx, p.125.

⁶⁴ ICC-01/05-1/13-481-Red, paras. 16-17.

⁶⁵ The Prosecution listed extracts of this report as potential evidence in connection with P-169's recall in 2014: CAR-OTP-0083-1307. See also ICC-01/05-01/08-3154-Red2, para. 6.

60. Bearing in mind that the burden for establishing 'relevance' is low,⁶⁶ the Requested Information is clearly relevant to the preparation of the Defence, and falls within the ambit of Rule 77 of the Rules of Procedure and Evidence.

It is the responsibility of the Prosecution, and not the Defence, to request Trial Chamber III to reclassify this information in order to enable disclosure in the Article 70 case

61. Although the Defence *could* request Trial Chamber III to reclassify the Requested Information, the Prosecution is *required* to do so, and should not shift its disclosure obligations onto the Defence.

62. Unlike the *ad hoc* Tribunals, the Prosecution is required to disclose Rule 77 materials even if the Defence has not submitted a specific request for disclosure.⁶⁷ The Prosecution therefore has a continuous duty to review the contents of the Main Case file for materials, which might be relevant in light of the evolving contours and issues in the Article 70 case.

63. The Prosecution has in fact seised Trial Chamber III repeatedly with requests to reclassify information in order to facilitate its disclosure, and use by the Prosecution in the Article 70 case.⁶⁸ It would be incompatible with the Prosecutor's duties under Article 54(1) for the Prosecution to restrict such requests to incriminating evidence, rather than information identified by the Defence as being relevant to Defence preparation.

64. The Prosecution is also better placed to formulate such requests. If the Defence for Me. Kilolo petitions Trial Chamber III for the Requested Information,

⁶⁶ ICC-02/05-03/09-501, para. 42.

⁶⁷ ICC-02/05-03/09-501, para. 34.

⁶⁸ ICC-01/05-01/08-3074; ICC-01/05-01/08-3253; ICC-01/05-01/08-3098-Red.

there is a risk that the Defence might omit certain information, of which the Defence is not aware.

65. In contrast, the Prosecution is aware of the content of the case file in ICC-01/05-01/08, and is duty bound to assess which information could be relevant to the Defence teams in the Article 70 case, and to request its reclassification if necessary.

Relief sought

66. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Trial Chamber to grant the 'Requête de la défense de monsieur Aimé Kilolo Musamba aux fins de divulgation d'informations relatives au témoin de l'Accusation 169'.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Date this 30st day of June 2015

The Hague, The Netherlands