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**International
Criminal
Court**

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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 Mangenda, Babala and Arido Defence Filings on the
« Requête de la Défense de Monsieur Aimé Kilolo Musamba aux fins de divulgation
d'informations relatives au témoin de l'Accusation 169 » (ICC-01/05-01/13-1030-Conf,
ICC-01/05-01/13-1031-Conf, ICC-01/05-01/13-1032-Conf)**

Source: The Office of the Prosecutor

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Section**

I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes the Mangenda, Babala and Arido Defence filings¹ regarding the Kilolo Defence's request *«aux fins de divulgation d'informations relatives au témoin de l'Accusation 169»*.² All three filings are discrete "requests" to which the Prosecution may appropriately respond, pursuant to regulation 24 of the Regulations of the Court. Mangenda's "response" expressly joins in Kilolo's request, thus comprising a request of his own. Similarly, the relief sought in Babala's and Arido's self-styled "observations" belie their nature.³

2. The Defence filings (collectively, "Requests") fail as a matter of law and should be dismissed. The Prosecution incorporates its previous submissions on the matter by reference.⁴

3. However, as already mentioned,⁵ if the Trial Chamber VII ("Chamber") considers it necessary, the Prosecution can provide the material sought to the Chamber *ex parte*, for the Chamber to determine whether disclosure is appropriate.

II. Confidentiality

4. This submission is filed as "Confidential" as it responds to filings so designated. The Prosecution has no objection to this filing being reclassified as "Public".

¹ See ICC-01/05-01/13-1030-Conf (Mangenda "Response"), ICC-01/05-01/13-1031-Conf (Babala "Observations") and ICC-01/05-01/13-1032-Conf (Arido "Observations").

² ICC-01/05-01/13-1023-Conf.

³ ICC-01/05-01/13-1030-Conf, para.6; ICC-01/05-01/13-1031-Conf, para.9; and ICC-01/05-01/13-1032-Conf, para.6.

⁴ ICC-01/05-01/13-1034-Conf.

⁵ ICC-01/05-01/13-1034-Conf.

III. Background

5. On 22 June 2015, Kilolo requested the disclosure of payments made to P-0169, a Prosecution witness in the Main Case.⁶ The request has been made before, and rejected by the Single Judge on two occasions.⁷

6. On 24 June 2015, the Chamber shortened the deadline for the Parties to “respond” to Kilolo’s request. On 25 June, Mangenda, Babala and Arido joined Kilolo’s request, demanding that the information be disclosed to them as well.⁸

IV. Submissions

7. In addition to the submissions already made on the matter,⁹ the Prosecution notes that, although Mangenda asserts that his request is not a fallacious *tu quoque* defence, the rationale he provides for the information sought concerning P-0169 shows this to be the case. Arido also alludes thereto, by suggesting a parallel between the Prosecution’s conduct regarding P-0169 and that of the Accused concerning Main Case Defence witnesses as - “allegations with a similar flavour”.¹⁰

⁶ ICC-01/05-01/13-1023-Conf.

⁷ 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).

⁸ ICC-01/05-01/13-1030-Conf, para.6; ICC-01/05-01/13-1031-Conf, para.9; ICC-01/05-01/13-1032-Conf, para.6.

⁹ ICC-01/05-01/13-1034-Conf.

¹⁰ ICC-01/05-01/13-1032-Conf, para.4 : “To the extent that the publicly available information suggests that the Prosecution may have paid sums of money to a Witness or witnesses to secure their testimony in the Bemba Main case the Arido Defence notes that if true, it clearly raises the spectre of whether the Prosecution’s actions with regards to subsequently pursuing article 70 of the Statute proceedings against the Defence – on the basis of allegations with a similar flavour – show consistency in light of the Prosecution’s prior conduct.”

8. Mangenda's argument that the material sought is relevant to show "an established practice of providing payments to witnesses at the ICC" is pre-textual, and underscores its lack of materiality or *prima facie* relevance. That witnesses are paid at the ICC — as is necessary for any number of legitimate ends — is neither a contestable issue in this case, nor unique to the circumstances of the Main Case. It is thus not specific to P-0169 or any other witness in the Main Case.¹¹ And, assuming *arguendo* that the material might establish the claimed proposition, such information is readily obtainable from the Registry, the Victims and Witnesses Unit, and likely also the Office of Public Counsel for the Defence or Counsel Support Section.

9. The ubiquity of information available to the Defence to establish the legitimate payment of witnesses as an institutional practice of the Court renders the request for P-0169's specific records of payments unnecessary and/or cumulative. This also militates against the *prima facie* materiality of the specific information sought.

10. That no Defence team has, to date, attested to any attempt to obtain information from any other source about the Court's practice of paying witnesses for legitimate purposes underscores that the sole reason this information is sought in respect of P-0169 is indeed, to mount a *tu quoque* defence.

11. Furthermore, Mangenda's contentions regarding the legality of his surveillance by national authorities are collateral to the issues concerning P-0169, to which his response is ostensibly addressed. Mangenda neglects to mention that he personally participated in the Dutch proceedings, where he was represented by counsel,¹² and which resulted in a confirmation of the legality of his surveillance.¹³ Moreover, it is

¹¹ See ICC-01/05-01/08-3100, para.11 (noting that, "the materiality prong of rule 77 of the Rules is broad but not unlimited").

¹² ICC-01/05-01/13-424-Anx1, p.3 (noting Mangenda's representation by counsel, Mr van Straalen).

¹³ ICC-01/05-01/13-424-Anx1 (Decision of The Hague District Court, the three-judge division for criminal cases, on the motions by the public prosecutor and the complaints pursuant to Section 552a of the Dutch Code of Criminal Procedure of the suspect, 28 April 2014 "Wiretap Decision").

Mangenda's prerogative to challenge the admissibility of the wiretap evidence against him under article 69(7) of the Rome Statute ("Statute"). However, having participated in the relevant proceedings,¹⁴ he cannot now pretend that the basis of the Dutch court's determination that the acquisition of such evidence and its transmittal to the Court was legal is unknown to him.¹⁵

V. Requested Relief

12. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the Requests. 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 7th Day of July 2015
At The Hague, The Netherlands

¹⁴ ICC-01/05-01/13-424-Anx1, pp.4-8 (noting the arguments advanced by Mangenda and their disposition. These include, *inter alia*: the violation of European Court of Human Rights, the violation of applicable privileges and immunities under the Headquarters Agreement, and the inadequate selection of the examining magistrate).

¹⁵ ICC-01/05-01/13-1030-Conf, para.4.