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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***

Public Document

**Prosecution Response to Defence Request for Disclosure of Information
concerning the Fourteen Witnesses**

Source: The Office of the Prosecutor

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 Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Mr Philippe Larochelle

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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Defence Request for Disclosure of Information concerning the Fourteen Witnesses (“Defence Request”).¹ The Defence Request is overbroad and unfounded. The information the Defence seeks has already been disclosed, is immaterial to the Defence’s preparation, or does not exist.

2. The Defence has already received all information that might have an impact on the credibility of the Prosecution witnesses in this case. The Court’s jurisprudence is clear. Information about witness payments or assistance is disclosable only if they are extraordinary. No such payments or assistance exist in this case.

3. The Defence further fails to provide any cogent reasons why information about non-extraordinary witness payments and assistance generally, and as concerns any of the 14 witnesses in the Main Case² underlying the charged incidents in particular (“14 Witnesses”), is material to their preparation. The bases of relevance advanced in the Defence Request, including the likelihood of Defence payments corrupting witnesses,³ and witnesses’ perceptions of acceptability of certain payments,⁴ have no bearing on any contested issues in this case. And, even if they might, they are wholly unsubstantiated.

4. The Defence’s request for disclosure of information regarding all contacts between the Prosecution and Defence witnesses in the Main Case⁵ is overbroad and unsubstantiated. *First*, to the extent that such information falls within the Prosecution disclosure obligations, it has already been disclosed. *Second*, even where such information is relevant to the issue of whether witnesses consented, or needed to

¹ ICC-01/05-01/13-1103-Corr.

² ICC-01/05-01/08.

³ ICC-01/05-01/13-1103-Corr, paras.18-21.

⁴ ICC-01/05-01/13-1103-Corr, para.20.

⁵ ICC-01/05-01/13-1103-Corr, paras.6.ii., 45.

consent, to testify in the case prior to being placed on the Prosecution's List of Witnesses for trial, it is immaterial.

II. Submissions

A. The Defence fails to demonstrate the materiality of the information sought concerning any payments and assistance provided to witnesses.

5. The relevance and materiality of the information sought concerning payments and assistance by the Prosecution to the 14 Witnesses is not discernible from the Defence Request.

6. Information regarding Prosecution payments and the provision of other forms of assistance to any witness in the Main Case is *prima facie* irrelevant, absent a specific showing of how it falls within the scope of rule 77 of the Rules of Procedure and Evidence or article 67(2) of the Rome Statute. The Defence Request fails to provide such a basis. The request for such information - as the Prosecution has previously argued in relation to a similar request from the Kilolo, Mangenda, Babala and Arido Defence teams - amounts to no more than a *tu quoque* argument, and is thus immaterial to the substantive charges in this case.⁶

7. As the Chamber has recognised in the Decision on Prosecution Request to obtain Records from the Victims and Witnesses Unit ("VWU"),⁷ this case concerns the "allegations of improper interference of 14 defence witnesses in the Main Case, including alleged bribery of these witnesses."⁸ These allegations concern the actions of the five Accused towards the commission of the charged offences against the administration of justice. It was in this context that the Chamber referred to the

⁶ See ICC-01/05-01/13-1034-Conf, para.11; ICC-01/05-01/13-1067-Conf, para.10.

⁷ ICC-01/05-01/13-983-Conf.

⁸ ICC-01/05-01/13-983-Conf, para.5.

relevance of payments effected to the 14 Witnesses,⁹ when it found that the Prosecution was entitled to obtain records of such payments in the possession of the VWU.¹⁰ This does not render *all* payments, or other forms of assistance that the Prosecution might have provided, automatically disclosable.

8. The Defence wrongly compares the payments made by the Prosecution with those with which the Accused are charged.¹¹ The charges in this case do not call for an abstract examination of the relative merits of payments made by the “Defence” and the “Prosecution” in criminal proceedings. Rather, they are specific to the conduct of the Accused as *individuals* in this case. Although the Defence’s strategy in conflating these issues is obvious, no legal basis exists for doing so. There is a clear distinction between payments made by, or on behalf of, a Defence team for legitimate purposes, and those made by the Accused in the context of an illicit plan to corruptly influence witnesses, which they orchestrated and executed, and which are at issue here.¹²

9. Furthermore, the allegations of bribery or other improper influence through the illicit payments must be considered in the context of all the other relevant allegations in the case, including the illicit coaching of witnesses, and promises and inducements corruptly made by the Accused to influence their evidence before the Court.

10. The contested issues in this case include, among other things, (i) whether the Accused, including through illegitimate payments, promises, or coaching, acted corruptly to influence the 14 Witnesses; (ii) whether certain payments made by the Accused to the 14 Witnesses constituted reimbursements of justifiable expenses; (iii) specifically in relation to the offence of the presenting of false evidence in court,

⁹ ICC-01/05-01/13-983-Conf, para.5.

¹⁰ ICC-01/05-01/13-983-Conf, paras.4-10.

¹¹ ICC-01/05-01/13-1103-Corr, paras.4, 18-23.

¹² ICC-01/05-01/13-1034-Conf, para.10.

whether the interference had an effect on the witnesses' in-court testimony;¹³ and (iv) the Accused's *mens rea*. None of these issues are linked to the Prosecution payments to Defence witnesses.¹⁴ Even if such payments could purportedly help demonstrate the likelihood of Defence payments corrupting or influencing witnesses,¹⁵ or the witnesses' "conception as to what are acceptable [...] forms and amounts of assistance",¹⁶ they are irrelevant and speculative. As the Pre-Trial Chamber has properly determined, corruptly influencing a witness "[...] must be understood as a conduct crime [...]".¹⁷ Thus, whether such conduct results in the actual or likely corruption of witnesses is irrelevant to the resolution of any contested fact at trial, and therefore immaterial to the preparation of the Defence.

B. The Defence otherwise possesses the disclosable information sought

11. With respect to those of the 14 Witnesses who are on the Prosecution's List of Witnesses,¹⁸ the Defence has already received all the information in the Prosecution's possession to which it is entitled, namely "information pertaining to payments, benefits or other forms of assistance that *go beyond the ordinary requirements of subsistence*."¹⁹ This includes any information pertaining to witness credibility.

12. The Defence requests disclosure of so-called "immunity agreements". The Prosecution has not offered anyone in this case immunity from prosecution. However, to the extent that Statements of Limited Use agreements²⁰ employed by the

¹³ This is a factual issue arising out of the manner in which the offence is pled in relation to some of the 14 Witnesses, not, in the Prosecution's submission, a requirement of the offence as such.

¹⁴ ICC-01/05-01/13-1103-Corr, para.18.

¹⁵ ICC-01/05-01/13-1103-Corr, paras.18-21.

¹⁶ ICC-01/05-01/13-1103-Corr, para.20.

¹⁷ ICC-01/05-01/13-749, para.30.

¹⁸ P-20, P-198, P-201, P-214, P-243, P-245, P-260, and P-261.

¹⁹ ICC-01/05-01/08-3167-Conf, para.33 (emphasis in the original), referring to ICC-01/05-01-08-1857-Conf, paras.10-12; see also *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-294-ENG CT, 25 May 2010, p.28, Ins.1-10; ICTR, *Prosecutor v. Karemera et al.*, ICTR/98-44/T, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para.16.

²⁰ Limited use statement ("LUS") agreements are formalised agreements between the Prosecution and persons to whom article 55(2) applies, whereby the latter provides the Prosecution with an oral or written statement for the

Prosecution in this case regarding certain witnesses may be disclosable, the Prosecution has already done so in relation to all witnesses who provided statements pursuant to such agreements, including those the Prosecution intends to call at trial.²¹

C. The Defence's request concerning the disclosure of the frequency, context and content of contacts between the Prosecution and the 14 Witnesses is overly broad and unsubstantiated

13. The Defence Request for disclosure of "any information, notes or records concerning the date, duration, participants, content and context"²² of the contacts between the Prosecution and the Defence witnesses is overbroad and unsubstantiated. Not every contact with witnesses, let alone those who are not called as the Prosecution's witnesses in this case, is material to the Defence's preparation. Absent a specifically articulated purpose, such information is not disclosable.

14. To date, the Prosecution has disclosed all "key"²³ information regarding the witnesses it intends to call at trial that falls within its obligations under rules 76, 77 or article 67(2). Such information includes any substantive statements of the witnesses, including those witnesses interviewed under article 55(2), information about whether the witnesses' rights were respected, and the identities of the persons interviewing them.²⁴

15. Likewise, the Prosecution has disclosed all the information material to the Defence preparation that is linked to any of the 14 charged incidents. The Defence

purpose of pursuing leads or developing additional information or evidence on the condition that such statement will not be used against the person, except as stipulated in the agreement.

²¹ See CAR-OTP-0077-1095 (Agreement on the statement of limited use with Witness P-245), disclosed on 20 June 2014; CAR-OTP-0078-0303 (Agreement on the statement of limited use with Witness P-260), disclosed on 20 June 2014; CAR-OTP-0084-1424 (Agreement on the statement of limited use with Witness P-261), disclosed on 31 July 2015.

²² ICC-01/05-01/13-1103-Corr, paras.6.ii., 45.

²³ ICC-01/05-01/13-1103-Corr, para.30.

²⁴ The only limitations to this were the applications of Court-approved redactions.

Request speculates as to the existence of other relevant information, implying that further contacts took place with the witnesses that had an impact on the contents of their expected testimonies,²⁵ but fails to demonstrate actual materiality of the information sought. Again, absent such a concrete showing, the information on all the contacts with all 14 Witnesses remains undisclosable.

D. The information concerning consent of witnesses to speak to the Prosecution or testify is irrelevant and immaterial

16. As stated in the Prosecution's 23 July 2015 email to the Defence, the relevance and materiality of information concerning whether witnesses on the Prosecution's List of Witnesses for trial provided "informed consent" prior to being designated on the List,²⁶ is unclear at best.

17. The Protocol regulating, among other things, contacts with the witnesses of the opposing party was adopted only on 20 July 2015,²⁷ and did not apply to any contacts made prior to that date. Even after its adoption, contrary to the Defence assertions,²⁸ the Prosecution does not have to apply through the Defence in this case to obtain the consent of the witnesses it wishes to talk to, absent a clear indication from the Defence that it wishes to call such persons as its witnesses in this case.²⁹ No such intention has been conveyed to the Prosecution in this case in relation to any witnesses.

18. Similarly, the Defence does not demonstrate how the issue of whether the Prosecution, when investigating the Main Case, obtained the consent of Defence

²⁵ See ICC-01/05-01/13-1103-Corr, paras.42-43.

²⁶ ICC-01/05-01/13-1103-Corr, paras.38-40.

²⁷ ICC-01/05-01/13-1093-Anx.

²⁸ ICC-01/05-01/13-1103-Corr, para.34.

²⁹ ICC-01/05-01/13-1093-Anx, paras.4, 34-35.

witnesses prior to speaking to them,³⁰ is in any way relevant to the preparation of the Defence in this case. A similar request was rejected by Trial Chamber III in the Main Case on the grounds that the information sought was not shown to be *prima facie* material.³¹

19. None of the Defence arguments substantiate the request for the disclosure of *all* information about contacts between the Prosecution and the 14 Witnesses, nor do any arguments advanced in the Defence Request touch upon witnesses that the Prosecution does not intend to call.

III. Relief Sought

20. For the foregoing reasons, the Defence Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 3rd Day of August 2015
At The Hague, The Netherlands

³⁰ ICC-01/05-01/13-1103-Corr, paras.32-33.

³¹ Trial Chamber III rejected the disclosure to the Bemba Defence in the Main Case of “[i]nformation concerning the circumstances under which Defence witnesses were interviewed, which might be relevant to the credibility and reliability of any statements taken through such interviews” (ICC-01/05-01/08-3020-Red, para.28.iii), finding that “the defence has not established the *prima facie* materiality of other information relating to such contacts, including the circumstances surrounding them”. See ICC-01/05-01/08-3100, paras.27-28.