

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 24 August 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***

Public

**Decision on Defence Request for Disclosure of Information concerning the
Fourteen Witnesses**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

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REGISTRY

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Detention Section

Victims Participation and Reparations Section

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (the ‘case’), having regard to Articles 64(2) and 67(2) of the Rome Statute (the ‘Statute’) and Rules 77 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Defence Request for Disclosure of Information concerning the Fourteen Witnesses’.

I. Procedural History

1. On 27 July 2015, the Defence for Mr Bemba (the ‘Defence’) requested the Chamber (the ‘Application’) to order the Office of the Prosecutor (the ‘Prosecution’) to disclose, *inter alia*, information concerning payments to the fourteen Defence witnesses at issue in this case (the ‘fourteen Defence witnesses’) who testified for the Defence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the ‘Main Case’).¹
2. On 3 August 2015, the Prosecution filed a response opposing the Application (the ‘Response’).²
3. Also on 3 August 2015, the Defence for Mr Arido filed a response supporting the Application.³

II. Submissions

A. The Defence

4. The Defence requests disclosure of:
 - i. “Any information, notes or records concerning payments made by the Prosecution (either on its own behalf or on behalf of VWU) to witnesses, who testified for the Defence in the Main Case; and

¹ ICC-01/05-01/13-1103, Corrigendum to Defence Request for Disclosure of Information concerning the Fourteen Witnesses.

² ICC-01/05-01/13-1118, Prosecution Response to Defence Request for Disclosure of Information concerning the Fourteen Witnesses.

³ ICC-01/05-01/13-1119, Narcisse Arido’s Response to the Bemba Defence Request for Disclosure of Information Concerning the Fourteen Witnesses (ICC-01/05-01/13-1103).

- ii. Any information, notes or records concerning the date, duration, participants, content and context of contacts between the Prosecution and witnesses who testified for the Defence in the Main case".⁴
- 5. The Defence argues that whereas the charges in the case are predicated on the Prosecution's position that the fourteen Defence witnesses provided false testimony to the Court due to financial or security incentives from the Defence or influence from the accused, the same corruption of witnesses could arguably have arisen with respect to payments of money or assistance received from the Prosecution.⁵ The Defence argues that testimony allegedly influenced by the Defence is equally susceptible to influence through Prosecution payments.⁶
- 6. Recalling the finding of the Chamber that payments to defence witness other than the fourteen Defence witnesses could be useful in understanding the overall system of money transfers and payments of witnesses in the Main Case, the Defence argues that, equally, information of other payments to the fourteen Defence witnesses would contextualise the likely impact of such payments on those witnesses.⁷ The Defence argues that the type and amount of expenses reimbursed by the Prosecution could provide a yardstick in relation to whether the amounts or forms of assistance provided by the Defence would be likely to influence or corrupt a person's testimony.⁸
- 7. Alternatively, the Defence argues that information concerning whether any of the fourteen Defence witnesses, many of whom were interviewed by the Prosecution either before or after their interaction with the Defence,

⁴ Application, ICC-01/05-01/13-1103, para. 6

⁵ Application, ICC-01/05-01/13-1103, para. 4.

⁶ Application, ICC-01/05-01/13-1103, para. 23

⁷ Application, ICC-01/05-01/13-1103, para. 18, citing Decision on Prosecution Request to obtain Records from the VWU, ICC-01/05-01/13-983-Conf, 4 June 2015.

⁸ Application, ICC-01/05-01/13-1103, para. 21.

requested the Prosecution for financial or other assistance, whether granted or otherwise, could suggest a predisposition or motive to testify one way or another, in order to obtain particular benefits or assistance as a result of his or her status as a witness, independent of any influence of the accused in the case.⁹ It is argued that such motives could in turn cast doubt upon the credibility of a witness.¹⁰

8. The Defence argues that witness credibility may also be affected by the threat of investigation and prosecution brought to bear by the Prosecution and submits that, as such, information concerning immunity agreements offered by the Prosecution is relevant and subject to disclosure.¹¹
9. Averring that contact by a party with a witness is predicated on the informed consent of the witness,¹² the Defence submits that information concerning the context within which the consent was obtained is relevant to ascertaining the informed nature of such consent and is therefore relevant to the admissibility of the information obtained from a person.¹³
10. It is further argued that where a witness recants his or her testimony, the Defence should be entitled to receive information which could cast doubt on the reliability of the recantation,¹⁴ including the context in which such recantation occurred.¹⁵
11. The Defence submits that it has exhausted all disclosure avenues for this information.¹⁶

⁹ Application, ICC-01/05-01/13-1103, paras 3, 16, 19, 22 and 26.

¹⁰ Application, ICC-01/05-01/13-1103, para. 26.

¹¹ Application, ICC-01/05-01/13-1103, para. 28.

¹² Application, ICC-01/05-01/13-1103, para. 36.

¹³ Application, ICC-01/05-01/13-1103, paras 41 and 44.

¹⁴ Application, ICC-01/05-01/13-1103, para. 24.

¹⁵ Application, ICC-01/05-01/13-1103, para. 42.

¹⁶ Application, ICC-01/05-01/13-1103, paras 7 to 15.

B. The Prosecution

12. The Prosecution contests the Application on the ground that the Defence has already received all of the information that might have an impact on the credibility of the Prosecution witnesses in this case.¹⁷ The Prosecution argues that, in accordance with the jurisprudence of the Court, only information concerning extraordinary payments or assistance to witnesses is liable to disclosure and further that no such payments or assistance exist in this case.¹⁸
13. The Prosecution argues that the bases of relevance advanced in the Application, including the likelihood of Defence payments corrupting witnesses, and witnesses' perceptions of acceptability of certain payments, have no bearing on any contested issues in this case and, at any rate, are wholly unsubstantiated.¹⁹ The Prosecution contends that the comparison made by the Defence between payments made by the Prosecution and those with which the accused are charged cannot be sustained as there is a distinction between payments made by or on behalf of a defence team for legitimate purposes and those made as part of a plan to corrupt witnesses.²⁰
14. The Prosecution states that no immunity from prosecution has been offered to anyone in this case, and submits that to the extent that agreements²¹ have been made by the Prosecution and may be disclosable, such disclosure has already taken place.²²

¹⁷ Response, ICC-01/05-01/13-1118, para. 2.

¹⁸ Response, ICC-01/05-01/13-1118, paras 2 and 11(citing *The Prosecutor vs. Jean-Pierre Bemba Gombo* 'Decision on "Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure"' (ICC-01/05-01/08-3159-Conf), ICC-01/05-01/08-3167-Conf, para. 33).

¹⁹ Response, ICC-01/05-01/13-1118, para. 4.

²⁰ Response, ICC-01/05-01/13-1118, para. 9.

²¹ The Prosecution explains that 'Statements of Limited Use agreements' are formalised between the Prosecution and persons to whom Article 55(2) of the Statute applies, where the latter provides the Prosecution with an oral or written statement for the purpose of pursuing leads or developing additional information or evidence on the condition that such statement will not be used against the person (Response, ICC-01/05-01/13-1118, footnote 20).

²² Response, ICC-01/05-01/13-1118, para. 12.

15. The Prosecution argues that the second limb of disclosure requested in the Application is overly broad and unsubstantiated as not every contact with witnesses is material to the preparation of the Defence.²³
16. Finally, the Prosecution argues that the Defence does not demonstrate how the issue of whether the Prosecution obtained the consent of Defence witnesses in the Main Case prior to interviewing them is relevant to the preparation of the Defence in this case.²⁴

III. Analysis and Conclusion

17. In accordance with the jurisprudence of the Court, there are two stages to an application brought pursuant to Rule 77 of the Rules.²⁵ First, it must be determined, on a *prima facie* basis,²⁶ whether the objects in question are 'material to the preparation of the defence'. The phrase 'material to the preparation of the defence' must be interpreted broadly and is 'understood as referring to all objects that are relevant for the preparation of the defence',²⁷ and not only to those directly linked to exonerating or incriminating evidence.²⁸ Second, if the information is material to the preparation of the defence, the Chamber must consider whether any restrictions on disclosure are justified under the Statute and Rules 81 and 82 of the Rules.
18. The Defence argues that the first limb of information sought is material to its preparation as it will contextualise the influence of Defence payments

²³ Response, ICC-01/05-01/13-1118, para. 13.

²⁴ Response, ICC-01/05-01/13-1118, para. 18.

²⁵ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor', 28 August 2013, ICC-02/05-03/09-501 OA4 (*Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501), para. 35.

²⁶ *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 42.

²⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA11, paras 77-80 (*Lubanga* OA11 Decision, ICC-01/04-01/06-1433); *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 38.

²⁸ *Lubanga* OA11 Decision, ICC-01/04-01/06-1433, para. 77.

on the fourteen witnesses in question and/or call into question their credibility.

19. The Chamber recalls that “at the heart of this case are allegations of improper interference of 14 defence witnesses in the Main Case, including alleged bribery of these witnesses” and “[a]ccordingly, information related to payments effected to these witnesses is potentially relevant to the case.”²⁹ Such relevant payments would include those made to the fourteen Defence witnesses by the Prosecution, or requests therefor. Whereas the Prosecution argues that it has disclosed information pertaining to payments, benefits or other forms of assistance that go beyond the ordinary requirements of subsistence, the Chamber considers that details of *all* payments made by the Prosecution to those witnesses may be material to the Defence’s preparation and are therefore subject to disclosure, including payments made by the Prosecution to witnesses on behalf of the VWU. This is the case, given that the Defence is arguing that if payments made by the Prosecution to witnesses of amounts similar to those correspondingly paid by the Defence to its witnesses did not lead to corruption, then they could have led to corruption in the context of Defence payments.
20. In respect of the second limb of the Application, the Chamber is of the view that the circumstances under which the witnesses recanted their testimony may be material to the preparation of the Defence. However, not every contact the Prosecution makes with these fourteen Defence witnesses is relevant to the circumstances surrounding these recantations, and the Application is overbroad in this respect. There is no information suggesting that the Prosecution has under-disclosed the details of its relevant witness contacts and, given its submission that it has disclosed all

²⁹ Decision on Prosecution Request to obtain Records from the VWU, 4 June 2015, ICC-01/05-01/13-983-Conf, para.5.

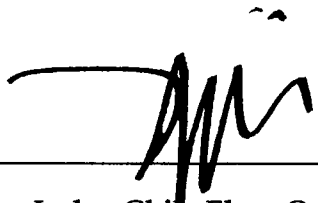
contact details which are material to the Defence's preparation, the Chamber rejects this limb of the request.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Application.

ORDERS the Prosecution to disclose all previously undisclosed payments and other forms of assistance given by the Prosecution to the fourteen Defence witnesses, as well as all correspondence and documentation concerning these payments.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Bertram Schmitt

Dated 24 August 2015

At The Hague, The Netherlands