

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 March 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 Redacted Document

**Public redacted version of "Prosecution's Response to Mangenda's Request
for the Admission of Evidence from the Bar Table", 14 March 2016,
ICC-01/05-01/13-1720-Conf**

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 Mangenda’s Request for the Admission of Evidence from the Bar Table (“Bar Table Motion”).¹ Many of the documents identified in the Bar Table Motion lack any relevance to the charges in this case. Others that may be relevant to the charges in this case are being tendered for reasons that are ostensibly irrelevant to this case and are opposed on those grounds.

2. The Prosecution’s position with respect to each of the opposed categories contained in the Bar Table Motion is particularised below.

II. Confidentiality

3. This response is filed as “*Confidential*” as it addresses confidential evidence. A “*Public Redacted*” version will be filed shortly.

III. Submissions

A. Categories A, B, and F: Documents indicative of the propriety of purchasing and providing telephones and telephone credit to witnesses, and documents showing the scope of proper payments to witnesses²

4. The Prosecution opposes the admission of documents in Categories A, B, and F, concerning materials and payments given to Prosecution witnesses, because they lack relevance to the charges. The Defence’s Bar Table Motion erroneously assumes that these documents somehow explain the criminal behaviour charged in this case. The

¹ ICC-01/05-01/13-1665 and ICC-01/05-01/13-1665-Conf-AnxA.

² ICC-01/05-01/13-1665-Conf-AnxA, pp. 1-3, 13-14.

documents, viewed in isolation, however are patently irrelevant. The Defence has yet to call any witness or tender other evidence explaining that the Accused's conduct alleged in this case was based on the Prosecution's own practices. As previously argued,³ such records, particularly when viewed in isolation and especially as related to witnesses who are neither the subject of the charged incidents, nor have testified, have no bearing on the particular circumstances of this. The Bar Table Motion presents no specific factual or legal nexus to a contestable issue.

5. The Prosecution's provision of any item of material value to witnesses has no relevance in and of itself. The conduct at issue here is not payment of witnesses in the abstract, but the corrupt payment of Defence witnesses to influence their evidence before the Court. The Prosecution's provision of witness expenses in respect of a particular witness in the Main Case or in any other case has no logical bearing on whether the Accused corruptly paid witnesses as alleged.

6. Further, the allegations of bribery or other improper influence through illicit payments must be considered not only through the alleged payments, but in the context of all the other relevant evidence. For example, through the provision of telephones, Kilolo and Mangenda were able to continue their communications with witnesses after the contact cut-off date. As the evidence shows, these communications were used in turn to illicitly coach the Defence witnesses in the Main Case.⁴

7. No matter what reimbursement practice is applied in this or in other cases, it is clear that paying witnesses corruptly to influence their testimony before the Court is proscribed. The Defence has not presented any link between the Prosecution's payments and the conduct of the Accused either during the Prosecution's

³ ICC-01/15-01/13-1034.

⁴ ICC-01/05-01/13-1110-Conf, paras. 50-52; Testimony of P-0245, ICC-01/05-01/13-T-23-CONF-ENG ET, pp. 16-17, lns. 23-1; Testimony of P-260, ICC-01/05-01/13-T-19-CONF-ENG ET, pp. 14-33, lns. 24-1.

presentation of evidence in this case, or during that of the Defence. Therefore, the materials in these categories are plainly irrelevant.

8. Finally, to the extent that evidence related to the practices regarding witness expenses may assist the Chamber, it has already received the expert evidence of witness D21-009. The additional documents the Defence seeks to introduce provide no further assistance in this matter.

B. Categories C, D, and E: Payments to Prosecution Witnesses P-0245 and P-0260

9. To the extent that the Defence seeks to admit the materials in these categories for the purpose of showing the permissible scope of payments to witnesses, the same arguments apply as for the records in the Categories A, B and F: the records are *prima facie* irrelevant and the Prosecution opposes their admission on that basis.

10. To the extent that the Defence seeks to introduce these documents to assess the credibility of Witnesses P-0245 and P-0260, the argument is speculative. With the exception of a few documents, the Defence failed to present these documents to the Witnesses and examine them in relation to the discreet issues arising out of them, during their respective testimonies.⁵ As such, the Witnesses were not offered a fair opportunity to comment on the Defence's hypothesis.⁶

⁵ With respect to P-0245, almost all the documents listed in Category C were also listed on the Mangenda Defence's list for cross-examination of the witness. See email from the Mangenda Defence to the Chamber and the parties on 22 October 2015. All but three (CAR-OTP-0091-0264-R01, CAR-OTP-0082-2565, and CAR-OTP-0082-2567), which the Mangenda Defence also formally submitted immediately after the end of the witness's testimony, remained unused. See email from the Mangenda Defence to the Chamber and the parties on 27 October 2015. With respect to P-0260, the Mangenda Defence did not use any of the documents it placed on its list in court with the witness because it did not cross-examine him. See email from the Mangenda Defence to the Chamber and the parties on 11 October 2015. CAR-OTP-0090-2121 was not on the Mangenda Defence list, even though it was disclosed on 9 September 2015 through Trial rule 77 Package 27.

⁶ In *Ruto and Sang*, Trial Chamber V(A) ruled that in cross-examining a witness on an issue relating to credibility, a "basic rule of fairness requires that such questions be put to the witness by any cross-examiner inclined to make an issue out of them later in the case [...] at first opportunity when the witness is on the stand". ICC-01/09-01/11-900, para.19. Rule 90(H)(ii) of the ICTY Rules of Procedure and Evidence stipulates that "In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining

C. Category I: Transcripts annotated by Mangenda

11. The Prosecution objects to the admission of transcripts purported to have been annotated by Mangenda as they are not *prima facie* relevant to the charges. The items do not establish any discernible link to the interpretation of the meaning of the code “[REDACTED]” at all, let alone within the timeframe of the charges.

12. *First*, annotated transcripts purport to show that Mangenda highlighted transcripts of hearings, as is ordinarily done by Case Managers. At most, the transcripts show that Mangenda would have done his job as a Case Manager in 2010 and early 2011, a fact not contested by the Prosecution. The Defence does not explain the link, if any, between these annotations, and the use of the term “[REDACTED]” between the Accused in the charged period. On this basis alone, the transcripts bear no relevance to the issues in this case.

13. Contrary to the Defence’s position, the conversations where the expression “[REDACTED]” is mentioned demonstrate clearly that its meaning cannot be reconciled with the use in the literal sense as the Defence suggests, but that it denoted the corrupt influencing of witnesses.⁷

14. For example, in the aftermath of D-0025’s testimony, on 27 August 2013, Kilolo emphasized to Mangenda in a telephone conversation that he had given D-0025 clear instructions to stay on script: “[REDACTED]”.⁸ During the same telephone conversation, Mangenda reported to Kilolo Bemba’s satisfaction with the results:

party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.” *See also* ICC-01/05-01/13-859-AnxD, paras. 5, 8.

⁷ *See also* ICC-01/05-01/13-1110-Conf-AnxA, pp. 34-41.

⁸ CAR-OTP-0074-0992 (Audio); CAR-OTP-0079-0114 at 0121, lns. 179-180 (Translation).

“[REDACTED]”.⁹ Kilolo confirmed that Bemba had to realize that the witness had been well-coached because of the precision with which he had testified.¹⁰

15. In another example, regarding Witness D-0029 (D21-0003), Mangenda reported to Kilolo, then on mission in Cameroon,¹¹ that unlike other Defence witnesses, D-0029 did not abide by his instructions:¹² he had “[REDACTED]”.¹³ Kilolo then emphasised that he had previously explained to Bemba that the illicit coaching needed to happen close in time to the witnesses’ testimony because otherwise the witnesses were likely to forget: “[REDACTED]”.¹⁴

16. Mangenda agreed, saying that the Co-Counsel must be satisfied that “*il y a un témoin qui dit la vérité*”¹⁵ and that he [Co-Counsel Peter Haynes] could now see how the Witnesses would testify if not prepared: “[REDACTED]”.¹⁶

17. From these examples, it is obvious that the expression is used as shorthand for illicit preparation of witnesses. Moreover, it is Kilolo, not Mangenda, who was directly executing the “[REDACTED]”. Of course, the Prosecution cannot exclude that Mangenda’s annotations could have been used to facilitate the corrupt influence of witnesses, and would therefore be relevant in that sense.

18. *Second*, the three transcripts originate from 2010 and early 2011,¹⁷ while the confirmed period of the charges runs from the end of 2011 until 14 November 2013. No transcripts have been produced for the period of the charges, in particular

⁹ CAR-OTP-0074-0992 (Audio); CAR-OTP-0079-0114 at 0118, lns. 103-107 (Translation).

¹⁰ CAR-OTP-0074-0992 (Audio); CAR-OTP-0079-0114 at 0119, lns. 108-111 (Translation).

¹¹ Kilolo was in Cameroon from 27 August 2013 to 3 September 2013: see CAR-D21-0001-0102 at 0102; Kilolo was using his Cameroon telephone number [REDACTED] to call Mangenda: see CAR-OTP-0074-0926 at 0931.

¹² CAR-OTP-0074-0997 (Audio); CAR-OTP-0080-0245 at 0249, ln. 75-0250, ln. 114 (Translation).

¹³ CAR-OTP-0074-0997 (Audio); CAR-OTP-0080-0245 at 0247, lns. 6-20 (Translation).

¹⁴ CAR-OTP-0074-0997 (Audio); CAR-OTP-0080-0245 at 0248, lns. 50-52 (Translation).

¹⁵ CAR-OTP-0074-0997 (Audio); CAR-OTP-0080-0245 at 0252, lns. 182-190 (Translation).

¹⁶ CAR-OTP-0074-0997 (Audio); CAR-OTP-0080-0245 at 0253, lns. 236-241 (Translation).

¹⁷ ICC-01/05-01/13-1665-Conf-AnxA, Category I, p. 17.

regarding the incidents of D-0015, D-0054, D-0013, D-0029, and D-0025, in relation to whom the term '[REDACTED]' was used.¹⁸ Additionally, some of the conversations between Kilolo and Mangenda took place prior to the witnesses testifying in the Main Case (for example in respect of D-0015, D-0054, and D-0013). Mangenda could therefore not have been highlighting the transcripts of their 'future' testimonies.

D. Category J: Submissions related to the Legal Representatives of the Victims ("LRV")

19. The Prosecution opposes the admission of the two filings from the Bemba Main Case as they are not *prima facie* relevant to the contested issues in this case.

20. *First*, contrary to the Mangenda Defence's assertion, all these documents show is that submissions regarding the questions of the LRVs were properly notified to the parties and participants in the Main Case. Beyond that, they do not show anything about the further circulation of such questions to persons that may or may not have been allowed to see them.

21. *Second*, the "nature of the questions" and the "significance of the alleged act of forwarding these questions to another team member by e-mail" are not at issue here. The Prosecution did not charge these acts in the abstract, but rather in the context of providing them to Kilolo with the full knowledge that they will be used to corruptly influence the witnesses' evidence before the Court.¹⁹

¹⁸ ICC-01/05-01/13-1110-Conf: Witness D-0015, para. 65; Witness D-0054, para.82; Witness D-0029, para. 194; Witness D-0025, para. 212.

¹⁹ ICC-01/05-01/13-1110-Conf, paras. 79-80, 95.

E. Category L: Corrected transcripts and translations of telephone intercepts

22. None of the changes proposed by the Defence to the transcriptions and translations undermine the overall accuracy of the Prosecution's transcripts and translations, nor do they materially affect the Prosecution's allegations supporting the charges. In fact, the Mangenda Defence does not explain how these corrections affect the charges in any way.

23. Most of the changes proposed by the Defence are insignificant, in that they simply add small words or replace words with their synonyms. They do not affect the meaning of the conversations in any way. Examples include the insertion of the word "*Bon*" at the beginning of a sentence,²⁰ changing the spelling of "*utilité*" to "*l'utilité*",²¹ or capitalizing letters and changing the punctuation in the sentence.²² In two cases, the Prosecution maintains that its translation is more accurate.²³

24. In respect of the audio CAR-OTP-0074-0997²⁴, the Defence proposes to replace the phrase "[REDACTED]" with "[REDACTED]." However, the Prosecution has already corrected and re-disclosed this translation on 19 June 2015²⁵ to read "[REDACTED]." ²⁶ The Prosecution considers that no further corrections are necessary.

²⁰ CAR-OTP-0080-0424 at 0425, ln. 4.

²¹ CAR-OTP-0080-0424 at 0425, ln. 5.

²² CAR-OTP-0080-0245 at 0248, lns. 50-52.

²³ In document CAR-OTP-0080-0424, ln. 5, the Defence's proposed correction of "[REDACTED]" into "[REDACTED]" is inaccurate, as is the proposed change in the same line to the corresponding translation CAR-OTP-0080-0299 at 0301 from "[REDACTED]" into "[REDACTED]."

²⁴ The changes are proposed in document CAR-D23-0005-0010, corrected translation of CAR-OTP-0080-0245, based on CAR-D23-0005-0003, corrected transcription of CAR-OTP-0080-0380.

²⁵ Trial INCRIM Package 26.

²⁶ CAR-OTP-0080-0245 at 0252, lns. 186-187.

25. Only two of the proposed changes are of some significance:

- (i) In respect of audio CAR-OTP-0074-0995,²⁷ the Defence proposes to replace the phrase “[REDACTED]”²⁸ with “[REDACTED]”;
- (ii) In respect of audio CAR-OTP-0074-1026,²⁹ the Defence proposes to replace the phrase “[REDACTED]”³⁰ with “[REDACTED]”.³¹

26. The Prosecution has no issue with the proposed changes, which, in any event, do not substantively alter the meaning of conversations concerned.

F. Category M: Video

27. The relevance and probative value of this video, which shows the everyday work of defence teams in three different cases³² is unclear.

28. *First*, the Mangenda Defence does not clearly articulate which part of the video is relevant to the case.

29. *Second*, to the extent that Mangenda might rely on the portion of the video showing the work and the interactions of the Bemba Defence team members, it is unclear what this video, made for public consumption, reveals beyond what is already known to the Chamber, namely: that the members of the Bemba Defence discuss the progress of the case; that they talk to Bemba, that they arrange the

²⁷ The change is proposed in document CAR-D23-0005-0008, the corrected translation of CAR-OTP-0079-0131, based on CAR-D23-0005-0001, corrected transcription of CAR-OTP-0079-0016.

²⁸ CAR-OTP-0079-0131 at 0139, ln. 225.

²⁹ The change is proposed in document CAR-D23-0005-0012, the corrected translation of CAR-OTP-0080-0299, based on CAR-D23-0005-0005, corrected translation of CAR-OTP-0080-0424.

³⁰ CAR-OTP-0080-0299 at 0303, ln. 84.

³¹ The corrected sentence in Lingala is “[REDACTED]”, which means, literally, “[REDACTED]”. The conversations shifts back to singular form thereafter.

³² Gbagbo, Ruto, and the Bemba Main Case Defence.

presence of witnesses for testimony; that they discuss the length of their examinations; and that they examine witnesses in court. None of these issues are in dispute.

30. Nevertheless, the Prosecution does not oppose the admission of those portions of the video containing the statements of Kilolo,³³ in which he concedes, *inter alia*, that he converses with Bemba on a daily basis, and discusses with him the preparation of the case, and of Kilolo and Mangenda, in which they discuss the testimony of a witness.³⁴ Anything else should be excluded.

G. Category N: Affidavit

31. The Prosecution opposes the admission of this document on the basis of its *prima facie* lack of reliability. The credentials and role of [REDACTED] in this case have not been established, especially in relation to why [REDACTED] would be in a position to attest to the distance between the various microphones in Courtroom 1 of the former premises of the Court in which P-0245 testified.³⁵ It is also unclear who took the measurements, when they were made, and with what tools. As the courtroom is no longer in use by the Court, conducting any verifications of the measurements contained in the affidavit may be impossible.

³³ CAR-D23-0005-0015, time stamp 10:01-10:55, 11:01-11:52, 13:00-13:52.

³⁴ CAR-D23-0005-0015, time stamp 13:54-14:04.

³⁵ Located at Maanweg 174, The Hague.

32. Notwithstanding, in light of the testimony that they relate to,³⁶ the Prosecution does not object to the exact measurements of the said distances being established, as long as they are established by objective and independent means.



Fatou Bensouda, Prosecutor

Dated this 16th Day of March 2016
At The Hague, The Netherlands

³⁶ ICC-01/05-01/13-T-27-CONF-ENG ET, 23 October 2015.