

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 7 July 2014

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Single Judge**

**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**

**Prosecution's Response to the Kilolo Defence's Request for Disclosure of  
Information Relating to the Reimbursement of the Prosecution 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**

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**Detention Section**

**Victims Participation and Reparations Others Section**

## I. Introduction

1. The Office of the Prosecutor (“Prosecution”) opposes the Kilolo Defence’s request for the disclosure of Prosecution expenses concerning witnesses in the case of *The Prosecutor v. Jean Pierre Bemba Gombo* (“Main Case”)<sup>1</sup>. The Request lacks a proper legal and factual basis for disclosure and fails to establish that the information sought is material to the preparation of the Defence. The Request should therefore be dismissed.

## II. Submissions

### **The Request lacks a valid legal and factual basis for disclosure**

2. The Request fails to establish a *prima facie* basis for the information sought. In principle, information related to witness expenses in a separate case has no evidentiary value in a subsequent case absent a specific factual or legal nexus to a contestable issue. Thus, what is ‘material’ will depend on the specific circumstances of each case.<sup>2</sup>

3. There is no nexus between the information sought and any contestable issue in the Article 70 case. First, the Main Case witnesses for whom the Defence seeks expense information<sup>3</sup> are not witnesses in this case. Accordingly, any alleged payments they have received have no bearing on the factual issues in this case. Further, as they are not witnesses here, their credibility is not at issue. Second, the purpose for which the Defence alleges that it seeks the information (namely, to demonstrate that parties’ reimbursement of witness expenses is a legitimate and

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<sup>1</sup> ICC-01/05-01/13-520 (“Request”).

<sup>2</sup> ICC-02/05-03/09-501, para. 39.

<sup>3</sup> Request, p. 9.

accepted practice within the Court)<sup>4</sup>, is not peculiar to the information concerning the Prosecution's Main Case witnesses. The general practice concerning witness expenses is not a relevant consideration. However, even if so, the Defence can readily and reliably establish this in several ways, including by recourse to the Registry and/or the VWU. A Chamber may properly consider the Defence's access to other information on the point at issue in determining the question of materiality.<sup>5</sup>

4. The legal provisions cited by the Defence<sup>6</sup> to support its submissions require that the Pre-Trial Chamber issue an order for disclosure *when the evidence may be material to the proper preparation of the person's defence*.<sup>7</sup> The Appeals Chamber has held that "the right to disclosure is not unlimited" and the application of Rule 77 of the Rules depends on "the specific circumstances of the case."<sup>8</sup> Here, the particular information sought is either irrelevant to the preparation of the Defence altogether, or its objective otherwise readily established by other information available to the Defence. Thus, the Request's claim that the information sought is *critical*, much less, material to the Defence's preparation is unsubstantiated.

5. The Request establishes no nexus between the information sought and the Article 70 case. The conduct at issue in the present case is not the payment of Defence witnesses in the abstract, but payment to corruptly influence their evidence before the Court. The Prosecution's provision for witness expenses in a separate case cannot logically determine whether the suspects corruptly paid witnesses, as alleged in this case. It is simply irrelevant.

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<sup>4</sup> Request, para. 10.

<sup>5</sup> ICC-02/05-03/09-501, para. 40.

<sup>6</sup> Request, para. 7.

<sup>7</sup> Article 57(3) of the Rome Statute and Rule 116(1)(a) of the Rules of Procedure and Evidence.

<sup>8</sup> Banda Appeals Decision, para. 39.

6. Contrary to the Defence's claim,<sup>9</sup> the information sought does not contextualise the circumstances of witness payments in the Main Case. No matter what reimbursement practice the Main Case employed, or that of any other case before this Court, it is clear that paying witnesses to influence their testimony is proscribed. Thus, information establishing the bounds of witness payment practises before the Court has no bearing on any material issue in this case.

7. Plainly, the Defence seeks to be able to draw a false comparison between payments allegedly made by the Prosecution to its witnesses in the Main Case, and those made by the Defence.<sup>10</sup> However, first, no such comparison exists in fact and the Request fails to advance any such parallel in terms of the charged offences; second, even if this were so, it would at best amount to a *tu quoque* defence and thus irrelevant to addressing the substantive charges in the Article 70 case. As such, the Request fails to meet the requirements for disclosure pursuant to Rule 77.

8. Lastly, the requested disclosure of expenses related to expert witnesses in the Main Case appears to be based on the Defence's assumption that the Prosecution intended to charge the suspect with corruptly influencing two Defence expert witnesses. As the Request was filed in advance of the Document Containing the Charges, the assumption is understandable. Nonetheless, it is erroneous and should be dismissed accordingly.

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<sup>9</sup> Request, para. 12.

<sup>10</sup> Request, paras. 12 and 16.

### III. Requested Relief

9. For the foregoing reasons, the Prosecution requests the Single Judge to dismiss the Request in its entirety.

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', is written over a horizontal line.

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**Fatou Bensouda, Prosecutor**

Dated this 7<sup>th</sup> Day of July 2014  
At The Hague, The Netherlands