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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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO*

Public
**Defence Request for Disclosure of Information concerning the Fourteen
Witnesses**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution's Rule 77 disclosure obligations must be shaped by the particular parameters, and nature of the case in question.

2. The charges in this case are predicated on the Prosecution's position that the 'fourteen witnesses' provided false testimony to the Court due to:
 - i. Financial or security incentives provided by the Defence; and/or
 - ii. Influence from the defendants.
3. Several of these witnesses were interviewed by the Prosecution before the witnesses interacted with the defendants, or afterwards.
4. This is a logical dissonance between arguing that these persons were corrupted through the payment of money from the Defence, but not when they received similar amounts of money or assistance from the Prosecution. If there is a distinction between the two scenarios, then it will turn on the particular facts and circumstances of the individual payments or forms of assistance. These facts and circumstances are therefore of material relevance to the Defence.
5. Moreover, although there is no 'property' in a witness, the fact that these individuals initially testified for the Defence in the Main Case triggers a right for the Defence to be disclosed of any information concerning the context in which these persons have decided either to testify for the Prosecution, or to amend their initial testimony in any material aspect.
6. The Defence for Mr. Bemba therefore requests the Trial Chamber to order the Prosecution to disclose:
 - 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
 - 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.

Procedural history

7. On 30 April 2015, the Defence for Mr. Bemba submitted the following disclosure request to the Prosecution:

In decision ICC-01/05-01/08-3070, the Trial Chamber in the Main Case found that all “Items generated during the course of contacts between prosecution and witnesses called by the defence may be material to the preparation of the defence” (para. 25). In order to assess the range of disclosable material concerning this decision, the Defence requests the Prosecution to disclose:

- The dates of all contacts between the Prosecution and Defence witnesses
- The means by which the witnesses were contacted (i.e. by telephone, in the Main Case; and email or in person).

8. On 8 May 2015, the Prosecution responded that since the Prosecution has not been notified of the identities of Defence witnesses for Mr. Bemba, the request was premature.

9. On 26 June 2015, the Defence for Mr. Bemba submitted the following inquiry to the Prosecution:

According to document CAR-OTP-0080-0498, D2 contacted [Redacted]¹ on 24 April 2014, and [Redacted] called him back on the same day. Can the Prosecution disclose the recording/notes of this conversation? If no such notes or recording exist, what was the time and duration of the two calls? Was D2 represented by counsel during this phone conversation? Who else was present on either sides of the conversations?

[...]

Irrespective as to whether the Prosecution or Court fulfilled these requests, can the Prosecution can confirm that it has disclosed all correspondence or communications from persons interviewed by the Prosecution in this case, which concern requests for:

- Financial benefits of any type (whether from the Prosecution or the Court itself);
- Asylum or relocation in connection with their testimony; or
- Any form of immunity or protection from investigation/prosecution by either the ICC Prosecution or national authorities.

10. On 11 July 2015, the Prosecution responded that the relevance of this information concerning the contacts between the Prosecution and D2 and D2 was not clear, and the Defence was not entitled to receive it. The Prosecution further noted that the conversations concerned ‘security matters’. In relation to the request for information concerning financial benefits, asylum or relocation requests, or immunity, the Prosecution claimed that the request was “overbroad and undefined”.

¹ A Prosecution investigator, who is assigned to both the Main Case and the Article 70 case.

11. On 10 July 2015, the Defence requested the Prosecution to disclose the following information:

invoices, records, receipts or correspondence in its possession concerning payment given directly by the Prosecution to the witnesses and potential witnesses who were:

- a) First interviewed by the Prosecution and then subsequently interviewed by the Defence in the Main Case; or
- b) Called by the Defence in the Main Case, and then subsequently interviewed by the Prosecution in the Article 70 case.

For the same two categories of persons, the Defence also requests the Prosecution to disclose any invoices, records, receipts or correspondence in its possession regarding payments issued by the Prosecution itself, or paid by the Prosecution on the basis of an advance provided by VWU, or on the basis of a pending request for VWU payment.

12. In light of the pending trial date (and the delay in receiving the Prosecution response in relation to the prior request), the Defence underscored the importance of receiving a prompt response on the part of the Prosecution, and noted that a failure to respond by 16 July 2015 would be considered to be a constructive denial.

13. The Defence sent a follow up inquiry on 20 July 2015, but did not receive any response.

14. On 23 July 2015, the Defence sent an inquiry to the Prosecution as to:

whether the Prosecution is in a position to provide the Defence with records in your possession, which demonstrate that each person included on the list of witnesses consented to testify as a Prosecution witness, prior to his or her inclusion on the list (i.e. prior to 30 June 2015).

15. The Prosecution responded the same day that:

The relevance and materiality of the information you seek is unclear. In fact, it is not stated at all. If you are prepared to provide it, the Prosecution will of course consider your request at such time.

Submissions

Disclosure of information concerning assistance and expenses paid to Defence witnesses in the Main Case

16. This case concerns payments and assistance to witnesses, and the impact of such payments on the testimony of these witnesses. Given this specific

context, information concerning whether any of the fourteen witnesses have requested and/or been provided assistance and expenses from the Prosecution, is relevant to the issues in the case, and disclosable as such.

17. The Trial Chamber recently found 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. Accordingly, information related to payments effected to these witnesses is potentially relevant to the case. This relevance extends beyond the 14 witnesses mentioned in the decision confirming the charges against the accused, as payments to other defence witnesses could be deemed useful in understanding the overall system of money transfer and payment of witnesses in the Main Case.²

18. In the same manner that payments to other defence witnesses could shed light 'on the overall system of money transfer and payment of witnesses in the Main Case', information concerning other payments to the same fourteen witnesses provides useful context as to the likely impact of payments on these particular witnesses.

19. Many of these witnesses were interviewed by the Prosecution both before and after the charged events. For witnesses who were interviewed in person, it must be presumed that the witnesses may have received some funds for logistical expenses, meals, lost earnings. The Prosecution has also not denied that expenses might have been paid directly to the witnesses by members of the Prosecution, and that it has records of such information.

20. The witnesses' conception as to what are acceptable (as opposed to unethical or inappropriate) forms and amounts of assistance is likely to have been shaped by, or informed by the witnesses' interactions with the Prosecution.

21. The type and amount of expenses reimbursed by the Prosecution could therefore act as a yardstick in relation to an assessment as to whether the particular amounts or forms of assistance provided by the Defence would be likely to influence or corrupt the persons' testimony.

² ICC-01/05-01/13-983-Conf, para. 5.

22. Alternatively, the possibility that some of the witnesses may have requested financial aid or assistance from the Prosecution in connection with their testimony – even if such forms of assistance were not granted – could suggest that the persons have a particular predisposition or motive to testify, which is independent of any influence on the part of the defendants in this case.
23. Moreover, if –as is alleged by the Prosecution – the testimony of such persons was influenced through payments from the Defence, it stands to reason that their testimony in this case is equally susceptible to influence through Prosecution payments.
24. For this reason, if the testimony of any of these witnesses deviates from their prior testimony, the Defence should be accorded the ability to explore all factors, which could account for this deviation, and to receive information which could cast doubt on the reliability of the witnesses’ recantation.³ Information concerning the context and circumstances under which a witness ‘recants’ his or her prior testimony is therefore disclosable under Article 67(2).
25. The context and circumstance should be construed to encompass all forms of assistance, which are likely to have influenced the person’s decision to provide information or testimony of a materially different nature to the Prosecution, or which may have motivated the person to testify as a Prosecution rather than Defence witness.
26. The motive of a witness to testify in a particular manner is linked to the witness’s credibility.⁴ In particular, a witness’s credibility might be impacted by the witness’s belief that the witness might obtain particular benefits (or assistance) as a result of his or her status as a Prosecution witness.⁵ This is particularly the case if the witness requested, and failed to receive certain benefits or forms of assistance whilst testifying for the Defence.

³ ICC-01/09-01/11-1549-Red, para. 18; See also *Prosecutor v. Kamuhanda*, Appeals Judgment, 19 September 2005, para. 225.

⁴ See for example, *Prosecutor v. Bizimungu et al*, Trial Judgement, 30 September 2011, paras. 762, 776, 783.

⁵ *Prosecutor v. Haradinaj et al*, IT -04-84bis-T, Decision on Joint Defence Motion for Relief efrom Rule 68 Violations by the Prosecution and for Sanctions pursuant to Rule 68, bis, 12October 2011; *Prosecutor v Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, paras 36-38;

27. Irrespective as to whether the request for particular assistance or expenses are granted, the fact that the witnesses direct such requests to the Prosecution (rather than the VWU for example), is relevant to the issue as to whether the witnesses perceive any ICC benefits to be derived from their status as a Prosecution witness.

28. The witness's credibility can also be affected by adverse pressure, or disincentives associated with the threat of potential investigation and prosecution. For this reason, information concerning immunity agreements are disclosable according to the practice of the *ad hoc* Tribunals.⁶ The fact that a suspect or accomplice has been afforded immunity by the Prosecution in exchange for testifying for the prosecution in itself creates a clear incentive for the person to shift responsibility onto one of all of the defendants. This susceptibility is clearly heightened in circumstances in which the Prosecution has provided the same person with other forms of assistance and benefits.⁷

29. Accordingly, to the extent that information concerning expenses, assistance, or immunity offers either requested by or provided to these particular witnesses might elucidate their potential motive to testify in favour of the Prosecution or against the Defence, it is disclosable under article 67(2) as "information which may affect the credibility of Prosecution evidence".

Disclosure of information concerning frequency, context and content of contacts between the Prosecution and the fourteen witnesses

30. Irrespective as to the jurisdictional division between the Article 70 case and the Main Case, there should be no disclosure lacunae as concerns Mr. Bemba's right to obtain key information concerning persons, who testified as Defence witnesses in the Main Case, and who are listed as 'Prosecution witnesses' in the current case.

⁶ *Prosecutor v. Halilović*, Decision on Defence Motion for Identification of Suspects and other Categories Among its Proposed Witnesses, 14 November 2003, p. 3.

⁷ *Prosecutor v. Zigiranyirazo*, Trial Judgment, 18 December 2008, paras. 138-139.

31. The question as to whether the Prosecution is wearing its Article 70 cap or its Main Case cap during such interviews is not always clear. Some of the investigators or lawyers involved are appointed to both cases, and there is a fine – if not non-existent – line between questions concerning the credibility of Defence witnesses vis-à-vis the Main Case, and questions concerning the witnesses' suspected knowledge or involvement in the Article 70 allegations.
32. If the persons had been interviewed under the parameters of the Main Case regime, then the Prosecution would have needed to have obtained the consent of the persons in question in order to speak to them, the Defence would have had a right to be present or to obtain a recording.⁸
33. Under the post-testimony regime, the Prosecution would have needed to seek judicial authorisation and ensure that contacts were coordinated through the VWU.⁹ Items generated in connection with such contacts would also, in principle, be disclosed to the Defence.¹⁰
34. Alternatively, if the Prosecution interviewed them under the Protocol which was recently adopted by this Trial Chamber, they would need to obtain the person's consent (*via* the Defence), the Defence would have the right to be present, and the interview would be recorded.¹¹
35. The only deviation from this requirement is if the persons in question are appearing as Prosecution rather than Defence witnesses in this case. If that is the case, the Protocol specifies that:

The parties or participants carry the responsibility of ensuring that witnesses they intend to call provide, whenever possible, their informed consent in writing to their involvement with the Court. This consent should be provided before the provision of any witness statement.¹²

36. The golden thread running through all these scenarios is that there is a presumption that contacts with witnesses should be predicated on the witness's informed consent: irrespective of the conduit employed for ascertaining the consent of the witness, the witness should have the right to

⁸ ICC-01/05-01/08-813-Red, paras. 66-68; ICC-01/05-01/08-2293, para. 7.

⁹ ICC-01/05-01/08-3070, para. 16.

¹⁰ ICC-01/05-01/08-3070, paras. 24 and 25.

¹¹ ICC-01/05-01/13-1093-Anx.

¹² ICC-01/05-01/13-1093-Anx, para. 30.

determine –without any influence or pressure from the parties – whether the witness consents to be contacted by a particular party in this case.¹³

37. This requirement applies to both parties: although the Statute and Rules imbue the Prosecution with greater duties (as set out in Article 54), they do not vest the Prosecution with any greater rights as concerns its ability to interact with individuals involved in the proceedings.
38. The question as to whether a person can be required by the Chamber to testify without their consent, is moreover, entirely distinct from the question as to whether the Prosecution can, unilaterally, designate the person as a Prosecution witness, without the person's consent to be designated as such. This is particularly the case in circumstances in which the Prosecution is aware that the person has been interviewed by the Defence within the framework of the Article 70 case, and is therefore on notice that the person is a potential Defence witness.
39. The possibility that a person could be the subject of a summons also does not translate to right to have them summonsed as a Prosecution witness, as opposed to a Court witness,¹⁴ if the person has never consented to being designated as such. Nor does it entitle the Prosecution to contact the person, outside of the parameters which regulate the Prosecution's contact with non-Prosecution witnesses.
40. Accordingly, contrary to the position conveyed by the Prosecution on 23 July 2015, the existence or not of 'informed consent' as of 30 June 2015 is both highly relevant, and disclosable.
41. By the same token, information concerning the context within which 'consent' has been obtained is relevant to the 'informed' nature of such consent.

¹³ "the overarching consideration is the consent of the witness", ICC-01/04-01/06-1372, para. 11, cited in ICC-01/05-01/08-813-Red, para. 66.

¹⁴ Trial Chamber III has, for example, ruled that neither the Prosecution nor the Defence can contact a witness called as a 'Court witness': ICC-01/05-01/08-3154-Red2, para. 43.

42. As noted above, given the specific parameters of this case, if a witness recants or revises her or his testimony in any manner, the context in which that recantation occurred is relevant. This context may include:

- i. The frequency and mode of contact;
- ii. Whether the person is represented by counsel at the time;
- iii. The persons who are present, and the reason for their presence;
- iv. Whether the person is informed in advance of the contact, or has consented to being contacted;
- v. Whether any issues are discussed contemporaneously, which may have a bearing on the person's consent – including, but not limited to expenses, benefits, assistance, security measures, possible adverse consequences for the person if they do not consent to testify, and consequences for family members or associates.

43. Moreover, irrespective as to whether the persons should be considered as 'Defence' or 'Prosecution' witnesses, when interacting with these persons, the Prosecution is obliged to comply with the particular procedures and protections which apply to suspects. The Prosecution has a duty to prepare a proper record of such communications, which includes sufficient information in order to ascertain whether the suspects' rights were fully respected.

44. A failure to record the communications/interactions or to respect the person's rights could be relevant to either the admissibility of the information obtained from the person, or the question of the person's informed consent. The Defence thus has a corollary right to disclosure of these records in order to explore these issues.

Relief Sought

45. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Trial Chamber to order the Prosecution to disclose:

- 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
- 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.



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Dated this 27th day of July 2015
The Hague, The Netherlands