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No: **ICC-01/05-01/13**
Date: **10 August 2015**

TRIAL CHAMBER VII

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
Judge Olga Herrera Carbuccia
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

Confidential

Joint Request to Strike Prosecution Witnesses P-198 and P-201 From the Witness List

Source: **Defence for Jean-Pierre Bemba Gombo**
Defence for Aimé Kilolo Musamba
Defence for Jean-Jacques Kabongo Mangenda
Defence for Fidèle Babala Wandu
Defence for Narcisse Arido

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

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I. INTRODUCTION

1. Jean-Pierre Bemba, Aimé Kilolo, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido ("the Defence")[1] hereby request that two witnesses, P-198 and P-201, be struck from the Prosecution's witness list based on the non-disclosure of any statement, or even summary, of their anticipated testimony. This violates Rule 111 of the Rules of Procedure ("Rules") as interpreted in previous jurisprudence, as well as fair trial rights of the accused, *inter alia*, under Article 67(1)(a) and (b) of the ICC Statute. The failure is the more egregious in that Prosecution investigators appear to have done nothing to encourage one of them, despite the opportunity, to give a statement. The only appropriate remedy, given the egregiousness of the violation and the proximity of trial, is to strike these witnesses from the Prosecution's witness list.

II. APPLICABLE LAW AND PROCEDURAL BACKGROUND

2. Article 64(3) of the Statute requires a Trial Chamber to "[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings." This obligation and authority includes, pursuant to Article 64(3)(a), "provid[ing] for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of trial to enable adequate preparation for trial." This authority is a vital component of ensuring that the accused, under Article 67(1)(a) and (b) is informed "promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks"; and the right to "have adequate time and facilities for the preparation of the defence."

3. The Trial Chamber discharged this obligation during the Status Conference held on 24 April 2015, on the basis of which it issued the Order setting the commencement date for trial.[2] The Trial Chamber imposed a deadline for disclosure of all "incriminating materials" by 30 June 2015.[3] The date set for trial was determined "[i]n light of" the

[1] This submission is filed confidentially pursuant to Regulation 23*bis* (2) of the Regulations of the Court to correspond with internal communications and filings with the same classification. The Defence does not object to the reclassification of this submission as public should the Chamber so order.
[2] *Bemba et al.,* Order setting the commencement date for trial, ICC-01/05-01/13-960, 22 May 2015 ("Trial Order").
[3] *Bemba et al.,* Decision on Modalities of Disclosure, ICC-01/05-01/13-959, 22 May 2015, p. 19; Trial Order, para. 11.

disclosure deadline.[4] The Trial Chamber "further direct[ed] the Prosecution to file a list of evidence to be relied on at trial, as well as a list of witnesses no later than 30 June 2015."[5]

4. On 10 June 2015, the Chamber "invite[d]" the Prosecution to prepare a pre-trial brief which was to "explain[] the Prosecution's case theory with reference to the evidence it intends to rely on, and to submit it no later than 16 July 2015."[6] In accordance with extensions granted on 8 July[7] and 23 July 2015,[8] the Prosecution filed its Pre-Trial Brief on 31 July 2015.[9]

5. In addition to these specific deadlines and obligations imposed by the Trial Chamber to ensure the fairness of proceedings, Rule 76(3) of the Rules states that:

> The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

6. Rule 111 of the Rules, concerning "Record of questioning in general", provides that:

> A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present.

7. As held by Trial Chamber II in the *Katanga* case:

> [I]t is incumbent upon the Prosecution to produce signed witness statements of all witnesses it wants to present at trial. Rule 111 clearly states that "[a] record shall be made of formal statements made by any person who is questioned in connection with an investigation [...t]he record shall be signed by [...] the person who is questioned [...]" […] [T]he Chamber considers that rule 111 applies regardless of whether the statements of a witness are being audio/video recorded. Accordingly, a signed witness statement has to be taken from any person being questioned by the Prosecution in connection with an investigation, which shall be communicated to the Defence in case the Prosecution decides to

[4] Trial Order, para. 12.
[5] *Id*. para. 13.
[6] *Bemba et al*., Decision on the Submission of Auxiliary Documents, ICC-01/05-01/13-992, 10 June 2015, para. 21.
[7] *Bemba et al.,* Decision on the Prosecution Request for Extension of Page and Time Limits regarding its Pre-Trial Brief, ICC-01/05-01/13-1068, 8 July 2015.
[8] Email of Trial Chamber VII Communications to All Parties, "Timing of Filing of Prosecution's Pre-Trial Brief", 23 July 2015, 12:21.
[9] *Bemba et al*., Prosecution Pre-Trial Brief, ICC-01/05-01/13-1110-Conf, 31 July 2015.

> rely on the person's testimony, or which has to be disclosed under article 67(2) of the Statute or rule 77 of the Rules.[10]

III. SUBMISSIONS

(i) The Prosecution Has Failed to Provide Adequate Notice of Its Witnesses' Testimony

8. The Prosecution has failed to provide any statement, let alone summary, of the expected testimony of two of its witnesses, P-198 and P-201. The Defence has no notice their anticipated testimony. This violates the specific obligations imposed by this Trial Chamber as well as the Prosecution's obligations under the Rules.

9. First, Rule 111 of the Rules, as interpreted in previous jurisprudence,[11] requires the Prosecution to take and disclose statements from its witnesses. The Prosecution has not disclosed any such statements. The Prosecution has therefore violated its obligation to provide notice of its case, or violated its disclosure obligations, or both. The Prosecution also has a positive obligation to note down any inconsistencies in any Prosecution witness's description of events.[12]

10. Second, the Trial Chamber's deadline for the Prosecution to disclose all "incriminating materials" must be understood as including statements of the Prosecution's intended testimonial evidence. The deadline was 30 June 2015. The Prosecution sought no extension of this deadline in respect of these two witness's testimony, let alone statements of their intended testimony. The Pre-Trial Brief also provides no notice of the content of these two witnesses' testimony, despite the Trial Chamber's guidance that the Prosecution should indicate, if it did file a Pre-Trial

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[10] *Katanga and Ngudjolo*, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, ICC-01/04-01/07-1553, 23 October 2009 ("*Katanga* Disclosure Decision"), para. 35 (citations omitted).

[11] *Katanga*, Disclosure Decision, para. 35. See also *Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", ICC-02/05-03/09-295, 17 February 2012, para. 27 (requiring the Prosecution to "disclose, prior to the trial, copies of statements of persons he or she intends to call to testify, irrespective of the form in which such statements are recorded. Disclosure serves to inform the accused person of the prior statements and likely future testimony of the witnesses against him or her, thereby enabling him or her to prepare and to conduct his or her defence.")

[12] *Haradinaj et al*, IT-04-84*bis*-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81,* 18 November 2011, para. 37 (holding that the Prosecution has a general duty to make a record of any inconsistencies in a witness's account and to disclose it to the defence).

Brief, "the evidence it intends to rely on."[13] This accords with the notion of a Pre-Trial Brief at the ICTY, which also requires that notice be given of the content of each Prosecution witness's testimony.[14]

11. Third, the Prosecution may have failed to disclose information that actually constitutes a disclosable statement under Rule 76(1). The Prosecution has in previous cases interpreted "statement" too narrowly and, in consequence, has violated its disclosure obligations.[15] Knowing whether this is the case here is, of course, impossible without having access to the Prosecution's files.

12. Any and all such writings, regardless of their format, must be disclosed. As stated by the Appeals Chamber:

> The Appeals Chamber agrees with the Prosecutor and Messrs Banda and Jerbo that the ordinary meaning of the term "statement" as used in rule 76 *is broad* and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded.[16]

13. The Prosecution seems to agree in principle, having previously cited with approval ICTY caselaw in support of the view that a "statement" is nothing more than "an account of facts presented by a witness."[17] The case law cited by the Prosecution

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[13] *Bemba et al*., Decision on the Submission of Auxiliary Documents, ICC-01/05-01/13-992, 10 June 2015, para. 21.

[14] ICTY Rule 65 *ter* (E)(ii)("Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73 *bis*, to file the following: (i) the final version of the Prosecutor's pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law; (ii) the list of witnesses the Prosecutor intends to call with: (a) the name or pseudonym of each witness; (b) a summary of the facts on which each witness will testify; (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment; (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count").

[15] *Ruto et al*., Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions, ICC-01/09-01/11-743-Red, 20 May 2013, para. 20.

[16] *Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", ICC-02/05-03/09-295, para. 23 (italics added). *See Ruto and Sang*, ICC-01/09-01/11-743-Red, para. 20 ("This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a 'statement' of the witness for purposes of impeachment on the stand or submission under Rule 68 of the Rules").

[17] *Banda and Jerbo*, Prosecution's Document in Support of Appeal against Trial Chamber IV's "Decision on the Prosecution's Application for Leave to Appeal the 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", ICC-02/05-03/09-253, 14 November 2011, paras. 11, 13 ("The Prosecution submits that the ordinary meaning of the term "statement" in the context of judicial proceedings refers simply to an account of facts presented by a witness. It does not specify a "written vs. a taped oral" account or a transcribed account. This definition of a statement as an account of facts by the

expressly holds that "as a matter of law […] 'interview notes' are statements."[18] The Prosecution has, in previous cases, routinely disclosed investigators' witness interview notes, subject only to redaction of any "particular analysis or personal opinion" of the investigator that may fall under Rule 81(1).[19] "Personal analyses" or "personal opinions" do not encompass questions put to a witness[20] or factual information.

14. The Prosecution may not have disclosed such notes or records of meetings based on a narrow view of the definition of "statement". The Prosecution, for example, wrote to the Kilolo Defence on 5 August 2015 that **P-201** "ha[s] not unequivocally consented to testify for the Prosecution prior to the filing of the list of witnesses". This statement alone indicates that there *has* been contact between someone in the Office of the Prosecutor with this witness, and that the content of those contacts were probably written down.

15. Of greatest concern is the indication that Prosecution investigators implicitly *discouraged* Witness **P-198** from giving a statement:

> The OTP explained that it was actually possible to call someone without any prior statement as long as the OTP is convinced of the relevance of that person's testimony for the case before the Judges [….] P-0198 was told the meeting was a mere formality as he was not expected to give any details about his interactions with the ICC in general. The idea was just to seek a 'Yes' or 'No' answer to the question to know whether he would agree to be called as a witness to testify before the Judges.[21]
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> …

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witness is consistent with definitions in ordinary usage and specialized legal contexts. It is also consistent with the definitions recognized by other ad hoc tribunals construing similar statutory provisions. […] This concept of statement as no more than the witness's prior account is also consistent with decisions of the ad hoc tribunals. As the ICTY Appeals Chamber explained, like this Court's rules, the rules of that tribunal "do not define what constitutes a witness statement. The usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.")

[18] *Milutinović et al*., IT-05-87-T, Decision on Renewed Prosecution Motion, 15 January 2007, para.15; *Lukić & Lukić*, IT-98-32/1-T, Decision on Milan Lukić's Motion, 3 November 2008, para.16 ("[t]he interview Notes .... clearly fall within the meaning of 'witness statement'"); *Stanišić and Simatović*, IT-03-69, Decision on Prosecution Urgent Motion, 12 October 2011, para.27 ("'statement' in Rule 66(A)(ii) has been interpreted broadly in the Tribunal's case law to include interview notes [….] the far-reaching Prosecution disclosure obligations would, in any event, cover interview notes – whether exculpatory or incriminating.")

[19] *Lubanga,* Prosecution Submissions on Disclosure pursuant to Trial Chamber's I Order of 5 November 2010, ICC-01/04-01/06-2625-Red, 17 November 2010, para. 26 ("the fact that the document is internal work production does not, of course, mean that all information contained therein is protected against disclosure.")

[20] *Niyitegeka*, ICTR-96-14-A, Appeal Judgment, 9 July 2004, paras. 33-34 ("[a] question once put to a witness is not an internal note anymore; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules.")

[21] OTP Investigation Report, 24 June 2015, CAR-OTP-0090-1779, at 1780.

> The OTP reiterated the earlier request made to P-0198 not to get into details about his role [played] or interactions with the ICC.[22]

16. The implication is not only that the Prosecution has failed to act with due diligence to obtain statements from these two witnesses by the disclosure deadline set by the Trial Chamber, but may also have actively discouraged one or more of them from giving statements that would give such notice. Whether or not this constitutes a direct violation of any Trial Chamber decision, the failure to attempt to produce a statement does not accord with the clear purpose of the Trial Chamber's decisions or the requirements of a fair trial.

(ii) P-198 and P-201 Have Not Expressly Consented to Testify for the Prosecution Despite Their Inclusion on the Prosecution's Witness List

17. The Prosecution does not seem to have obtained the consent of P-198 or P-201 to appear as Prosecution witnesses.[23] The failure to have done so, in conjunction with the absence of any effort to take statements from these witnesses, undermines the purpose of a Pre-Trial Brief – which is to provide notice of the Prosecution case. The inclusion of evidence without a minimal basis to believe that the evidence will be adduced does not assist in streamlining the trial or Defence preparations.

(iii) Removal of these Witnesses From the Witness List Is An Appropriate Remedy

18. The Prosecution, by failing to provide statements or other notice of the content of the testimony of these two witnesses, has violated the Trial Chamber's 30 June 2015 deadline for disclosing incriminating evidence. It has also violated the obligation to provide notice of its case through the Pre-Trial Brief. The Prosecution has provided no notice of this violation, and sought no extension or relief. The Prosecution seems to believe that the witnesses can be called without any notice of their testimony.

19. A remedy proportionate to the violation is to order that the names of these two witnesses be struck from the witness list.

[22] *Id.* at 1781.
[23] Letter of the Prosecution to the Kilolo Defence "OTP/PD/20150805/OST", 5 August 2015, 17:26.

IV. CONCLUSION AND RELIEF REQUESTED

20. The Prosecution has failed to disclose statements, or even summaries of the anticipated testimony, of **P-198** and **P-201**. One of these witnesses was actively discouraged from giving a statement, and neither has been asked whether they consent to appear. In these circumstances, and given the imminent start of trial, the appropriate remedy is to remove these individuals from the Prosecution witness list.

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Dated this 10 August 2015,
At The Hague, The Netherlands