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**International
Criminal
Court**

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Date: 21 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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Confidential Document
With Confidential Annexes A, B and C**

**Prosecution Consolidated Response to Defence Requests in Relation to its
Witnesses List**

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 the Defence's "Joint Request to Strike Prosecution Witnesses P-198 and P-201 From the Witnesses List"¹ ("Joint Request"), the Kilolo Defence's "*Soumissions de la défense de monsieur Aimé Kilolo Musamba concernant le consentement de certaines (sic) témoins figurant sur la liste de témoins de (sic) du Procureur*"² ("Kilolo Request"), and the Babala Defence's "*Réponse à la Soumission de la défense de Monsieur Aimé Kilolo Musamba concernant le consentement de certains témoins figurant sur la liste de témoins du Procureur (ICC-01/05-01/13-1134-Conf-Red)*"³ ("Babala Request").⁴

2. The Requests should be dismissed because they fail to demonstrate any cogent legal or factual grounds to support the reliefs sought.

II. Confidentiality

3. This filing and its annexes are classified as "Confidential" as they refer to filings of the same designation. The Prosecution does not object to their reclassification as "Public".

III. Submissions

A. The Joint Request lacks a proper legal ground

4. At its core, the Joint Request is based on the erroneous premise that the Prosecution is under an obligation to take statements from every witness it seeks to call.⁵ No such obligation is contemplated within the Court's statutory framework.

¹ ICC-01/05-01/13-1132-Conf ("Joint Request").

² ICC-01/05-01/13-1134-Conf-Exp. A confidential redacted version was filed on the same day, ICC-01/05-01/13-1134-Conf-Red ("Kilolo Request").

³ ICC-01/05-01/13-1163-Conf ("Babala Request").

⁴ ICC-01/05-01/13-1132-Conf, ICC-01/05-01/13-1134-Conf-Exp and ICC-01/05-01/13-1163-Conf, are referred to collectively as the "Requests."

⁵ In particular, the Joint Request argues that the Prosecution violated rule 111 which requires it to take statements from its witnesses. See Joint Request, paras 1, 9.

5. The Joint Request's reliance on rules 111 and 76 of the Rules of Procedure and Evidence is misplaced⁶ and the Defence's characterisation of them is unsupported by any jurisprudence of the Court.

6. Contrary to the Joint Request,⁷ the Prosecution has not violated rule 111, which does not require the Prosecution to question any given individual. The plain wording of the rule requires simply that a record be made of formal statements given by a person "who is questioned in connection with an investigation or with proceedings".⁸ A potential witness who is not "questioned" does not implicate rule 111.

7. Likewise, rule 76 imposes no obligation on the Prosecution to obtain witnesses' statements, but only to disclose those within its possession and control. Indeed, the Appeals Chamber's jurisprudence confines the scope of the rule to the Prosecution's obligations to disclose evidence or other material it *has already collected*.⁹

8. In sum, the Joint Request's attempt to appropriate rules 111 and 76 to fashion an inexistent Prosecution procedural obligation, is both transparent and forced. Requiring the taking of a statement as a condition of calling witnesses arbitrarily constrains the Court's ability to hear evidence as may be necessary to the determination of the truth, and the Prosecution's ability to present it — both fundamental tenets of trial. Article 69(3) of the Rome Statute enshrines this principle in permitting the submission of all evidence a Chamber may consider necessary for the determination of the truth.

9. Followed to its logical conclusion, the Defence's position would allow an accused to defeat a trial where witnesses complicit in the crimes charged and

⁶ Joint Request, paras. 5, 6, 7, 9, 11.

⁷ Joint Request, paras.1, 9.

⁸ See rule 111 of the Rules of Procedure and Evidence.

⁹ As held by the Appeals Chamber: "Rule 76 falls under Section II (Disclosure) of Chapter 4 (Provisions relating to various stages of the proceedings) of the Rules of Procedure and Evidence. It pertains to the Prosecutor's obligations to disclose evidence or other material which [she] has already collected." ICC-02/05-03/09-295, para. 22 (emphasis added).

material to their proof simply decline an invitation to provide a statement. This is wholly at odds with the Court's statutory framework.

10. Calling witnesses to testify without an advance statement is a common practice before criminal tribunals, regardless of whether the witnesses' appearance is voluntary or compelled.¹⁰ Further, as a question of fairness, the issue devolves on whether one party holds an advantage over the other – which cannot be the case when such a statement is equally unavailable to the parties.¹¹

B. Calling witnesses P-0198 and P-0201 causes no unfair prejudice to the Defence

11. The Defence's allegations of the inadequacy of notice concerning the expected testimony of witnesses P-0198 and P-0201 lack merit and should be rejected.

12. *First*, the Defence cannot reasonably argue that there is any element of surprise about either the identity or expected testimony of these witnesses. Since the filing of the Prosecution's Document Containing the Charges ("DCC") over a year ago, the Defence has been well aware of the identity of the witnesses, the details and underlying evidence of the incidents involving the witnesses, and their relevance to the charges. These incidents are clearly set out in the DCC¹² and every other key

¹⁰ See e.g. in the *Charles Taylor* case in the Special Court for Sierra Leone ("SCSL"), witness Naomi Campbell was compelled to appear before the Trial Chamber to testify despite having never been interviewed by the Prosecution and despite her refusal to voluntarily testify at trial. The Trial Chamber granted the Prosecution's motion for the issuance of a *subpoena* compelling her to testify after having considered the relevance of Ms Campbell's anticipated testimony to identified issues at trial. *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, 30 June 2010. See also in the *Haradinaj* case, the Trial Chamber granted the Prosecution's request for the issuance of a *subpoena* for a witness who has never provided a statement to the Prosecution. Failure of the witness to appear after the *subpoena* had been served prompted an investigation with a view to initiate contempt proceedings against the witness. *Prosecutor v. Haradinaj*, IT-04-84-T, Prosecution's 22nd Application for a Subpoena *Ad Testificandum*, 17 October 2007, para. 5 and *Prosecutor v. Haradinaj*, IT-04-84-T, Order to Prosecution to Investigate with a View to Preparation and Submission of an Indictment for Contempt, 31 October 2007, para. 2.

¹¹ See e.g., *Prosecutor v. Duško Tadic*, Appeal Judgement, IT-94-1-A, 15 July 1999, paras.43, 44, 48 and 52 ("*Tadic* Appeal Judgement") (acknowledging that "the right to a fair trial ... covers the principle of equality of arms" and "means that the Prosecution and the Defence must be equal before the Trial Chamber"); see also *Prosecutor v. Callixte Kalimanzira*, Appeal Judgement, ICTR-05-88-A, 20 October 2010, para.34; *Prosecutor v. Ferdinand Nahimana et al.* Appeal Judgement, ICTR-99-52-A, 28 November 2007, para.173 ("*Nahimana et al.* Appeal Judgement"); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Appeal Judgement, ICTR-95-1-A, 1 June 2001, para.69 (quoting, *Tadic* Appeal Judgement, para.48); *Prosecutor v. Tharcisse Renzaho*, Appeal Judgement, ICTR-97-31-A, 1 April 2011, para.191 (citing *Nahimana et al.* Appeal Judgement, paras.173, 181).

¹² ICC-01/05-01/13-526-Conf-AnxB1, paras. 46-51 (P-0198) and paras. 52-59 (P-0201).

document in the case, including the Prosecution's confirmation submissions,¹³ the decision confirming the charges,¹⁴ and most recently the pre-trial brief.¹⁵ No statement of these witnesses would provide the Defence with any better notice of the subject matter of their evidence, short of the witnesses' prevarication. The Defence's ample knowledge of the details of the incidents involving these witnesses, the underlying evidence and their relevance to the case is further demonstrated by their lengthy and detailed confirmation submissions filed in July 2014.¹⁶

13. *Second*, the Defence was put on notice of the Prosecution's intention to call these witnesses, when the Prosecution filed its list of witnesses on 30 June 2015,¹⁷ in accordance with the timeline set by the Chamber in preparation for the commencement of trial.¹⁸ In its list of witnesses, the Prosecution informed the Defence that witnesses P-0198 and P-0201 are material witnesses who possess unique and material information pertaining to charged crimes.¹⁹ The Prosecution further explained in *inter partes* communications with the Defence²⁰ the materiality of the information these witnesses possess to the case, having been parties to incriminating conversations with Kilolo during the course of their testimony in the *Bemba* case.²¹ It was further explained that because Kilolo, being accused in this case, cannot be

¹³ ICC-01/05-01/13-597-Conf-AnxB, paras. 100-113 (P-0198) and paras. 114-130 (P-0201).

¹⁴ ICC-01/05-01/13-749.

¹⁵ ICC-01/05-01/13-1110-Conf, paras. 65-81 (P-0198) and paras. 82-106 (P-0201).

¹⁶ See for instance, ICC-01/05-01/13-594-Conf-Corr, paras. 73, 74, 90, 95, 96; ICC-01/05-01/13-600-Conf-Corr2, paras. 194, 577, 578, 579, 580, 581, 662, 663, 664, 761, 767, 778; ICC-01/05-01/13-599-Conf, paras. 69, 70, 74, 75, 77, 80, 132, 133, 134, 139; ICC-01/05-01/13-596-Conf-Corr, paras. 129, 132; ICC-01/05-01/13-598-Conf, paras. 195, 196, 197, 201.

¹⁷ ICC-01/05-01/13-1048 and annexes. The Defence was also aware that no statement is provided for these witnesses. No such statement was disclosed by the 30 June 2015 deadline set by the Chamber for the disclosure of all incriminating materials. The Prosecution's list of evidence clearly shows that there is no statement available for these two witnesses. ICC-01/05-01/13-1048-Conf-AnxB, Material related to Prosecution Witnesses at pp. 16-21. More specifically, the Prosecution's position about the possibility of calling witnesses without any prior statements as explained to Witness P-0198 was also known to the Defence. See investigator's report disclosed to the Defence on 30 June 2015 (CAR-OTP-0090-1779 at 1780) and cited in the Joint Request (para. 15). This information was further confirmed to the Defence in *inter partes* communications. See Annexes A and B appended to this filing containing correspondence addressed to Counsel for Mr Kilolo and copied to all Defence teams.

¹⁸ ICC-01/05-01/13-960, para. 13.

¹⁹ ICC-01/05-01/13-1048-Conf-AnxA-Red.

²⁰ See Annex B appended to this filing.

²¹ ICC-01/05-01/08.

compelled to testify to these conversations, the testimony of these witnesses is also unique.²²

14. *Third*, as noted above, in terms of fairness, the Defence is not placed in any way at a disadvantageous position relative to the Prosecution, should these witnesses testify without having given prior statements. The Defence would be on, at least, equal footing with the Prosecution in examining these witnesses at trial, and thus no unfairness is caused to the Defence in calling them. On the contrary, given that these witnesses are adverse to the Prosecution, as actors allegedly complicit in charged crimes, the Defence is presumptively in a more advantageous position when it comes to their examination in court, or even in securing advance interviews with them.²³

C. Consent is not required to call a witness to testify

15. The Requests assert, without any legal basis, that absent the witnesses' consent to testify they should be struck from the Prosecution's witnesses list.

16. The Joint Request further incorrectly argues that the absence of the witnesses' consent to testify for the Prosecution undermines the purpose of the pre-trial brief to provide adequate notice of the Prosecution's case.²⁴ This argument fails for two reasons: First, the charged incidents involving P-0198 and P-0201 by definition, are not dependent on any statement of theirs. Thus, the Defence's assertion that the Prosecution relies on evidence without any basis to believe that it will be adduced²⁵ is misconceived. Second, as noted, the Defence has received advance and ample notice of the Prosecution's case in general. And, as concerns P-0198 and P-0201 in particular,

²² See Annex B appended to this filing.

²³ For instance "*P-0198 avait exprimé à plusieurs reprises et de manière non équivoque son consentement à être contacté par la Défense et cela depuis la phase préliminaire de la procédure.*" Kilolo Request, para. 18. The same does not hold true for the Prosecution, where P-0198's lack of cooperation is best illustrated by his previous refusal to meet with the Prosecution in connection with the Main Case proceedings, and Kilolo's instructions to the witness as to the reasons he should mention - during his testimony in the Main Case - to justify such refusal. CAR-OTP-0074-1002 (Audio); CAR-OTP-0079-0025 at 0026-0027, lns. 36-54 (Transcript). This renders any attempt to interview this witness a mere futile investigative activity that should be avoided.

²⁴ Joint Request, para. 17.

²⁵ Joint Request, para. 17.

they have received extensive and detailed information in the pre-trial brief and in other documents, contrary to the Joint Request.²⁶

17. Further, the Prosecution case about these two witnesses is particularly straightforward because their illicit coaching has been caught on tape, leaving no room for surprise as to the subject-matter of their examination in court.

18. Not only do the Defence assertions fail legally, they are also logically flawed. The analogy drawn in the Kilolo Request between the witnesses' consent to be contacted by the investigating party and the witnesses' consent to testify is misguided.²⁷ Each serves a different purpose and neither undermines the preparation of the Defence. In the Contact Protocol,²⁸ a "witness" is defined as "a person whom a party intends to call to testify [...] provided that such intention has been conveyed to the non-calling party, by means that establish a clear intention on behalf of the calling party to rely upon the individual as a witness".²⁹ Nowhere in the Protocol is consent required for an individual to be considered a "witness".

19. The list of witnesses serves only as notice of a party's intention to call a given witness. It does not speak to the question of how this will be accomplished. The Defence's artificial reading of witnesses' consent as a predicate condition of placing them on a party's witness list (i.e., notice of a party's intent to call them) is further at logical odds with the Appeals Chamber's jurisprudence, which specifically allows for the compellability of witnesses.³⁰ If a non-consenting witness can be summonsed to testify, it goes without saying that such a witness can appropriately figure in a party's list of witnesses.

20. As noted, the Prosecution clearly and formally conveyed its intention to call P-0198 and P-0201 in its 30 June 2014 list of witnesses. Thus, the witnesses are within

²⁶ See para. 12.

²⁷ Kilolo Request, paras. 14, 15.

²⁸ ICC-01/05-01/13-1093-Anx ("Contact Protocol").

²⁹ ICC-01/05-01/13-1093-Anx, para. 4 (e).

³⁰ ICC-01/09-01/11-1598, paras. 1, 113.

the ambit of the Contact Protocol. Kilolo's disagreement³¹ with the Contact Protocol can neither invalidate the Prosecution's timely notice of its intention to call the witnesses, nor exclude their evidence at trial, irrespective of whether their appearance is voluntary or compelled.

21. The Defence's present position is undermined by the fact that their joint submissions on the adoption of a Contact Protocol never proposed that a witness's "consent" be a predicate condition to a party's stated intention to call the witness, as such.³² Moreover, the Defence did not move to re-argue or apply to appeal the decision issuing the Contact Protocol. In fact, the Defence's submissions accepted the definition of a "witness" as proposed by the Prosecution, requiring no such consent.³³

22. Babala's argument that compelling witnesses would give rise to article 55(1)(b) violations, which include subjecting the witness to coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment,³⁴ ignores the Appeals Chamber's jurisprudence, which specifically allows for the compellability of witnesses.³⁵ This argument is as flawed as his analogy equating calling a non-consenting witness with placing a football player in a football team to which he is not affiliated.³⁶ This underlines the Defence's misconception of the very notion of calling witnesses. There is no "ownership" in a witness – witnesses are called to testify to the *truth* of salient matters before the Court, not to support one team against the other.

23. There is no legal or factual basis for the Requests. And the Defence cannot now effectively re-litigate issues that it should have raised earlier, through the backdoor, circumventing the applicable procedure of the Court.

³¹ Kilolo Request, paras. 16-24.

³² ICC-01/05-01/13-898.

³³ ICC-01/05-01/13-898-AnxA, 4(e).

³⁴ Babala Request, paras. 21, 22.

³⁵ ICC-01/09-01/11-1598, paras. 1, 113.

³⁶ Babala Request, para. 20.

IV. Relief sought

24. For the reasons above, the Requests should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 21st Day of August 2015
At The Hague, The Netherlands