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No.: **ICC-01/05-01/13**
Date: **1 June 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

Public Document

Observations of the Defence for Mr Fidèle Babala on the constituent elements of the offence against the administration of justice under article 70 and on the modes of liability and their applicability (ICC-01/05-01/13-T-8-CONF-FRA)

Source: **Defence for Mr Fidèle Babala Wandu**

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

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I. BRIEF PROCEDURAL BACKGROUND

1. On 20 November 2013, Pre-Trial Chamber II of the International Criminal Court ("the Pre-Trial Chamber") issued a warrant of arrest under seal for Mr Fidèle Babala Wandu ("Mr Babala"), together with Mr Jean-Pierre Bemba Gombo, Mr Jean-Jacques Mangenda Kabongo, Mr Aimé Kilolo Musamba and Mr Narcisse Arido.[1]

2. On 30 June 2014, the Office of the Prosecutor ("the Prosecution") filed as confidential the Document Containing the Charges ("DCC")[2] against the above-mentioned persons. The redacted version of the document was communicated on 3 July 2015.[3]

3. The Prosecution alleges, in particular, that Mr Babala is responsible for the "offences intentionally committed against the administration of justice in violation of Article 70"[4] under article 25(3)(a), (c) and (e).

4. On 30 July 2014, the Defence team for Mr Babala ("the Defence") filed its response to the DCC.[5] The corrected versions of the response were filed respectively on 8 September 2014[6] and 9 January 2015.[7]

5. The Defence team filed its "*Réponse consolidée de la Défense de Monsieur Fidèle Babala Wandu à la* 'Prosecution Submission on the Confirmation of Charges' *(ICC-01/05-*

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[1] ICC-01/05-01/13-1-Red2-tENG.
[2] ICC-01/05-01/13-526-Conf-AnxB1.
[3] ICC-01/05-01/13-526-AnxB1-Red.
[4] *Ibid.*, para. 147 *et seq.*
[5] ICC-01/05-01/13-596-Conf.
[6] ICC-01/05-01/13-596-Conf-Corr.
[7] ICC-01/05-01/13-596-Conf-Corr2.

01/13-Conf-AnxB du 30-07-2014) et à la 'Prosecution's Response to Defence Confirmation Submissions' *(ICC-01/05-01/13-646-Conf du 21-08-2014)*".[8]

6. On 11 November 2014, the Pre-Trial Chamber confirmed in part the charges against Mr Babala, in particular, pursuant to article 61(7)(a) and (b) of the Rome Statute.

7. The Pre-Trial Chamber confirmed the charge against Mr Babala of having:

> pursuant to article 70(1)(a) and article 25(3)(c) of the Statute, for the purpose of facilitating the commission of the offence aided, abetted or otherwise assisted in the commission by witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, of the offence of giving false testimony when under an obligation pursuant to article 69, paragraph 1 of the Statute, to tell the truth, by way of managing and dispensing as necessary and appropriate to this effect the finances at Mr Bemba's disposal.[9]

8. On 30 January 2015, following the confirmation of charges the Presidency of the Court constituted Trial Chamber VII ("the Chamber") to be responsible for the conduct of the trial.

9. On 23 April 2015,[10] the Prosecution submitted a request to the Chamber:

> to provide notice of the possibility that the facts described in the charges may be subject to re-characterisation to accord with the participation of Babala and Arido under article 25(3)(a) and of all Accused under article 25(3)(d), pursuant to regulation 55(2).

10. At the status conference of 24 April 2015, the Chamber directed the parties to submit their observations on the constituent elements of the offence against the administration of justice under article 70 of the Statute and on the modes of liability and their applicability by 30 May 2015.[11]

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[8] ICC-01/05-01/13-671-Conf.
[9] ICC-01/05-01/13-749, pp. 52-53.
[10] ICC-01/05-01/13-922.
[11] ICC-01/05-01/13-T-8-ENG, p. 6, lines 10-18.

11. In their joint submission of 11 May 2015, the Defence teams requested that the deadline for the filing of Defence submissions on the constituent elements of the offences against the administration of justice and on the modes of liability and their applicability be suspended until they had received an updated DCC.[12]

12. In its Decision of 29 May 2015, the Chamber rejected the Defence teams' joint request of 11 May 2015.[13]

13. In compliance with the Chamber's directions of 24 April 2015, the Defence presents below its observations on the constituent elements of the offence against the administration of justice and the modes of liability under which Mr Babala is charged.

II. DEFENCE OBSERVATIONS

14. Firstly, the Defence notes that it is difficult for it to make submissions in the abstract on the modes of liability and the constituent elements amid the current uncertainty concerning the documents that the Prosecution is to submit, namely a document notifying the updated charges and a pre-trial brief, both of which were requested by the Defence teams, and in the absence of a decision on the Prosecution's request under regulation 55. Furthermore, the Prosecution has yet to present its evidence and case, and it goes without saying that the Defence's strategy and the development of that strategy hinge on this.

15. The Defence informs the Chamber that submissions concerning the constituent elements of the offence against the administration of justice under article 70 of the Rome Statute of the International Criminal Court ("the Statute") and the

[12] ICC-01/05-01/13-940-tENG.
[13] ICC-01/05-01/13-968.

modes of liability under which Mr Babala is charged are the focus of its Responses to the DCC of 30 July 2014[14] and 11 September 2014.[15]

16. These submissions, which were not rejected or – for that matter – even addressed by the Pre-Trial Chamber, remain valid and should be considered to be an integral part of the present Observations. They should therefore be considered to be repeated here in full.

17. To the extent that in its Decision on the confirmation of charges, the Pre-Trial Chamber confirmed the charge against Mr Babala of having

> pursuant to article 70(1)(a) and article 25(3)(c) of the Statute, for the purpose of facilitating the commission of the offence aided, abetted or otherwise assisted in the commission by witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, of the offence of giving false testimony when under an obligation pursuant to article 69, paragraph 1 of the Statute, to tell the truth, by way of managing and dispensing as necessary and appropriate to this effect the finances at Mr Bemba's disposal

the Defence has focused its arguments on the elements constituting the sole offence of corruptly influencing witnesses and the sole mode of liability under article 25(3)(c), namely aiding and abetting.

18. In the absence of a definition in the Statute, the Defence has adopted the definition of corruptly influencing of a witness under article 434(15) of the French Criminal Code:[16]

> The use of promises, offers, gifts, pressure, threats, acts of violence, scheming or contrivance in the course of proceedings or in respect of a claim or defence in a court of law to persuade another to make or deliver a false deposition, statement, or declaration, or to abstain from making a deposition, statement or declaration […]

[14] ICC-01/05-01/13-596-Conf-Corr, Section III, Subsection B: "*Analyse des modes de responsabilité envisagés par le Procureur*".
[15] ICC-01/05-01/13-671-Conf, Section II, Volume 1, Subsections E "*Analyse de l'article 70 du Statut*" and F "*Critiques de l'analyse des modes de responsabilité par le Procureur*".
[16] Amended by "*Ordonnance n° 2009-916 du 19 septembre 2000 – article 3 (V)*" [Ordinance no. 2009-916 of 19 September 2000], Official Journal of the French Republic, 22 September 2000.

Borrowing this definition is consistent with international criminal case law. In *Akayesu* before the ICTR, the Chamber had to borrow the definition of the modes of participation found in the Rwandan criminal system and rely on the Rwandan Criminal Code to define the three forms of criminal participation that constitute complicity.[17] Furthermore, this definition from French law is consistent with ICTY case law –

> the word "bribe" is liberally construed as an inducement offered to procure illegal or dishonest action or decision in favour of the giver. It is also defined as a price, reward, gift or favour bestowed or promised with a view to pervert the judgement of or influence the action of a person in a position of trust.[18]

19. In theory, the material element of this offence is constituted both by promises, offers, pressure, threats, acts of violence, scheming or contrivance on the part of the perpetrator, and the existence of judicial proceedings, while the element of intent is established when, according to article 30 of the Statute, there is proof of knowledge and intent to sabotage the judicial process by having a witness give a false testimony, statement or declaration or by encouraging the witness to refrain from making or giving testimony, a statement, or a declaration.

20. In concrete terms, the behaviour alleged by the Office of the Prosecutor ("the Prosecution"), namely:

> making promises to witnesses in exchange for false testimony; instructing witnesses on what to say when questioned in court, including scripting their evidence, dictating and rehearsing false answers and/or questions to be posed by the parties and participants in the *Bemba* case, or to contested issues in the trial proceedings, shortly before or after witnesses had been administered the solemn undertaking under Article 69(1) of the Statute and Rule 66 of the Rules[19]

must be supported by specific facts. Yet it could not be shown that Mr Babala engaged in any of this behaviour. Mr Babala was not a member of

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[17] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgement (2 September 1998), paras. 534-537, (ICTR, Chamber I).
[18] ICTY, *The Prosecutor v. Beqa Beqaj*, "Judgement on contempt allegations", IT-O3-66-R77, 27 May 2005, para. 18.
[19] ICC-01/05-01/13-526-AnxB1-Red, para. 22.

Mr Jean-Pierre's Defence team and knew nothing of the strategy adopted by this team. One of the two material elements has therefore not been demonstrated (promises, offers, pressure, threats, acts of violence, scheming or contrivance perpetrated by the accused), as is also the case for the element of intent.

21. To focus on the mode of participation confirmed by the Pre-Trial Chamber in its Decision confirming the charges against Mr Babala, namely aiding and abetting the corrupt influencing of a witness, it should be mentioned that aiding and abetting can only be confirmed if the perpetrator engaged in those acts of participation strictly defined by the Statute, given the strict interpretation of criminal law. Article 25(3)(c) of the Statute under which Mr Babala is being prosecuted states:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> […]
>
> For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

22. This provision contains two distinct acts of participation, namely, on the one hand, aiding, abetting and assisting, understood as being acts that prepare for or facilitate commission of the offence of corruptly influencing the witnesses listed, and, on the other hand, providing the means for the commission of the said offence.

23. Therefore, for these acts to be punishable, they must have taken place before or at least at the same time as the commission of the principal offence,[20] except where they are the result of a prior agreement between the principal perpetrator and the accessory. In addition, they must be positive.

24. Even if, following the "theory of borrowed criminality" developed by legal scholars, the material acts of the accessory do not necessarily have to be of a criminal nature in the sense that they are not necessarily unlawful, aiding and abetting is established only when material acts are knowingly committed, i.e. with intent to commit the offence. That is what article 25(3)(c) provides. In short, mere knowledge on the part of an alleged accessory of the criminal intent of the principal perpetrator or perpetrators is insufficient. That person's intent to facilitate the commission of the crime must also be established.[21]

25. Beyond the knowledge requirement, aiding and abetting as understood under international criminal law requires that the participation directly and significantly influenced the commission of the principal crime or offence.

23. Furthermore, as regards the accessory, criminality only exists if the principal crime was committed or at least attempted. Therefore, the legal characterisation of aiding and abetting can only be applied if the existence of the main crime, in this case corruptly influencing witnesses, has been established beyond reasonable doubt.

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[20] *The Prosecutor v. Callixte Mbarushimana,* "Decision on the confirmation of charges", ICC-01/04-01/10-465-Red, 16 December 2011, para. 286: "The Chamber notes that some of the pre-Rome Conference drafting history of the Statute, made in the context of discussing what ultimately became article 25(3)(c) of the Statute, shows that the drafters were cautious about including *ex post facto* aiding and abetting in the ICC legal scheme and believed that a specific provision would be necessary to criminalise such conduct."

[21] *Ibid.*, para. 274.

24. By alleging that

> BABALA provided the financial means to bribe witnesses, and paid witnesses and/or their relatives and close associates personally and through the other co-perpetrators and persons involved in implementing the Common Plan. In furtherance of and to implement the Common Plan, BABALA provided sums of money regularly to KILOLO, MANGENDA, ARIDO, and [REDACTED][22]

the Prosecution does not provide the slightest evidence of the corrupt influencing of witnesses, and certainly not of any knowledge or intent on the part of Mr Babala to participate in the offences against the administration of justice with which Mr Bemba and his former defence team are charged.

RESPECTFULLY SUBMITTED.

[signed]

Jean-Pierre Kilenda Kakengi Basila

Counsel for Fidèle Babala Wandu

Dated this 1 June 2015

At Denderleeuw, East Flanders, Belgium

[22] ICC-01/05-01/13-526-AnxB1-Red, para. 26.