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No.: ICC-01/05-01/13
Date: **3 December 2015**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding
Judge Marc Perrin de Brichambaut
Judge Raul C. Pangalangan

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 redacted version of

Decision on the ‘Prosecution’s Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses’

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

[REDACTED]

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Trial Chamber VII of the International Criminal Court ('Chamber' and 'Court' respectively), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('Case'), having regard to Articles 70(2), 64(2), 64(6)(b), 67(2), 93(1)(b) and 93(1)(d) of the Rome Statute ('Statute') and Rule 77 of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on the Prosecution's Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses'.

I. INTRODUCTION

1. On 10 September 2015, the Office of the Prosecutor ('Prosecution') filed a request under Articles 64(6)(b) and 93 of the Statute to summon witness P-201 ('First Request').¹
2. On 17 September 2015, the Prosecution filed another request under Articles 64(6)(b) and 93 of the Statute to summon witness P-198 ('Second Request', together with First Request, 'Requests').²
3. In the Requests, the Prosecution seeks the transmission of a request for assistance to the authorities of [REDACTED] so that the authorities may: (a) serve summonses on P-201 and P-198 and (b) compel and ensure their appearance to give testimony before the Court on the territory of [REDACTED] *in situ* or via video-link.³
4. On 24 September 2015, the Defence for Mr Babala ('Babala Defence') filed a joint response to the Requests ('Babala Response').⁴

¹ Prosecution's Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness, ICC-01/05-01/13-1237-Conf-Exp. A confidential redacted version was filed on 14 September 2015 (ICC-01/05-01/13-1237-Conf-Red).

² Prosecution's Second Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness, ICC-01/05-01/13-1259-Conf-Exp. A confidential redacted version was filed on 18 September 2015 (ICC-01/05-01/13-1259-Conf-Red).

³ First Request, ICC-01/05-01/13-1237-Conf-Red, paras 33-34; Second Request, ICC-01/05-01/13-1259-Conf-Red, paras 23-24.

⁴ Réponse consolidée de la Défense de M. Fidèle Babala Wandu aux requêtes de l'Accusation en vue de contraindre les témoins P-198 et P-201 à comparaître (ICC-01/05-01/13-1237-Red et ICC-01/05-01/13-1259-Conf-Red, ICC-01/05-01/13-1286-Conf).

5. Also on 24 September 2015, the Defence for Mr Bemba ('Bemba Defence') filed a response to both the First Request ('Bemba First Response')⁵ and the Second Request ('Bemba Second Response').⁶

II. SUBMISSIONS

A. The Prosecution

i. As to Relevance

6. The Prosecution submits that P-201 and P-198 testified in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ('Main Case') from [REDACTED] and were both [REDACTED] at the time of the events charged in the Main Case.⁷ The Prosecution submits that Mr Kilolo spoke with P-201 and P-198 several times after the cut-off date applied by the Victims and Witnesses Unit ('VWU') and also during the course of their testimony, and that he coached them to give false testimony on a host of topics.⁸
7. The Prosecution submits that Mr Kilolo coached P-201 to testify falsely: (i) in his examination in chief, as to, *inter alia*, his last contact with Mr Kilolo, Mr Bemba's military role,⁹ [REDACTED],¹⁰ [REDACTED];¹¹ and (ii) in examination by the Legal Representative for the Victims ('LRV'), as to the 'correct' answers to be provided in questioning.¹²

⁵ Defence Response to Prosecution Request to Summon a Witness (ICC-01/05-01/13-1237-Conf), ICC-01/05-01/13-1296-Conf.

⁶ Defence's Response to "Prosecution's Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness", ICC-01/05-01/13-1259-Conf-Red, ICC-01/05-01/13-1291-Conf. A corrigendum was filed on 25 September 2015 (ICC-01/05-01/13-1291-Conf-Corr).

⁷ First Request, ICC-01/05-01/13-1237-Conf-Red, para. 9; Second Request, ICC-01/05-01/13-1259-Conf-Red, para. 7.

⁸ First Request, ICC-01/05-01/13-1237-Conf-Red, paras 2, 10; Second Request, ICC-01/05-01/13-1259-Conf-Red, paras 2, 8.

⁹ First Request, ICC-01/05-01/13-1237-Conf-Red, para. 12.

¹⁰ First Request, ICC-01/05-01/13-1237-Conf-Red, paras 13 and 14.

¹¹ First Request, ICC-01/05-01/13-1237-Conf-Red, para. 17.

¹² First Request, ICC-01/05-01/13-1237-Conf-Red, para. 26.

8. The Prosecution similarly submits that Mr Kilolo coached P-198 to testify falsely: (i) in his examination in chief, as to, *inter alia*, his last contact with Mr Kilolo, the names and roles of the military leaders who exercised command and control over the MLC troops;¹³ (ii) [REDACTED];¹⁴ (iii) [REDACTED];¹⁵ and (iv) [REDACTED].¹⁶

ii. As to Specificity and Necessity

9. The Prosecution submits that P-201 and P-198 [REDACTED].¹⁷ The Prosecution also submits that it has exhausted all avenues to secure their voluntary attendance,¹⁸ and that they have thus far refused to cooperate and will not testify unless compelled¹⁹ (P-201 indicating that he has already given his testimony in the Main Case²⁰ and P-198 declining to testify without further information as to what he is expected to testify on).²¹

B. The Defence

10. Deferring to the Chamber with respect to the issuance of the summons, the Babala Defence opposes the testimony of the witnesses taking place by via video link, arguing that, in the specific circumstances of the Case, a proper assessment of the credibility of the witnesses requires hearing their testimony *in situ* to enable a personal and physical appreciation of such testimony by the Judges.²² The Babala Defence argues that the appearance of the witnesses

¹³ Second Request, ICC-01/05-01/13-1259-Conf-Exp, paras 8-12.

¹⁴ Second Request, ICC-01/05-01/13-1259-Conf-Exp, para. 14.

¹⁵ Second Request, ICC-01/05-01/13-1259-Conf-Exp, para. 16.

¹⁶ Second Request, ICC-01/05-01/13-1259-Conf-Exp, para. 17.

¹⁷ First Request, ICC-01/05-01/13-1237-Conf-Red, paras 3 and 28; Second Request, ICC-01/05-01/13-1259-Conf-Red, paras 3 and 18.

¹⁸ First Request, ICC-01/05-01/13-1237-Conf-Red, para. 29; Second Request, ICC-01/05-01/13-1259-Conf-Red, para. 19.

¹⁹ First Request, ICC-01/05-01/13-1237-Conf-Red, para. 30; Second Request, ICC-01/05-01/13-1259-Conf-Red, para. 20.

²⁰ First Request, ICC-01/05-01/13-1237-Conf-Red, para. 26.

²¹ Second Request, ICC-01/05-01/13-1259-Conf-Red, para. 19.

²² Babala Response, ICC-01/05-01/13-1286-Conf, paras 4, 5 and 15.

before the Chamber is more conducive to ascertaining the truth, given the solemn setting offered by the courtroom and the presence of the Judges.²³

11. The Babala Defence, furthermore, requests the Prosecution to disclose all audio and video recordings, investigation reports and all contacts with the witnesses, arguing that it is unclear whether the Prosecution took all necessary measures to obtain the consent of the witnesses.²⁴

12. The Bemba Defence concurs that P-201 and P-198 are material witnesses who could shed light on the charges in the Case.²⁵ It is argued that whereas a summons is a coercive measure (exposing the witnesses to a risk of sanctions) which can only be employed as a measure of last resort,²⁶ the Prosecution has not exhausted all reasonable alternatives to such a measure and the requests should therefore be dismissed.²⁷

13. In relation to witness P-201, the Bemba Defence argues that the Prosecution has not adduced an objective record establishing that the witness would be unwilling to testify, particularly if sufficient measures are employed to guarantee his security and protection.²⁸ It is further argued that summoning P-201 [REDACTED], thereby exposing him to risk.²⁹ In the alternative, the Bemba Defence argues that the summons should be suspended pending disclosure of the contacts between the Prosecution and P-201 (including the interaction which took place on [REDACTED]) and the contacts between the Prosecution and [REDACTED] in relation to P-201 (in view of the existence of potentially exculpatory information with respect to the former disclosure

²³ Babala Response, ICC-01/05-01/13-1286-Conf, para. 23.

²⁴ Babala Response, ICC-01/05-01/13-1286-Conf, para. 13.

²⁵ Bemba First Response, ICC-01/05-01/13-1296-Conf, paras 6 and 14; Bemba Second Response, ICC-01/05-01/13-1291-Conf-Corr, para. 3.

²⁶ Bemba First Response, ICC-01/05-01/13-1296-Conf, para. 6.

²⁷ Bemba Second Response, ICC-01/05-01/13-1291-Conf-Corr, paras 1 and 19.

²⁸ Bemba First Response, ICC-01/05-01/13-1296-Conf, para. 3.

²⁹ Bemba First Response, ICC-01/05-01/13-1296-Conf, paras 6 and 14, 20, 22.

request, and the existence of information regarding measures to guarantee the safety of the witness with respect to the latter request).³⁰

14. In respect of witness P-198, the Bemba Defence argues that the Prosecution's request does not reflect any obstructive behaviour on the part of P-198 justifying the summons.³¹ It is argued that a witness cannot be considered unwilling or obstructive on the basis of a reasonable request by him for further particulars concerning the scope of requested testimony and the party for whom they will be appearing.³²

III. PRELIMINARY PROCEDURAL MATTERS

15. In the interest of judicial economy, the Chamber has considered the Requests jointly and hereby delivers a single decision thereupon, noting that they raise the same or similar substantive issues.

16. It is noted that the Requests were filed with a confidential *ex parte* classification, only available to the Prosecution and the VWU. The Chamber sees no need to retain this classification and, pursuant to Regulation 23 *bis*(3) of the Regulations of the Court, these Requests are reclassified as confidential.

IV. ANALYSIS AND CONCLUSIONS

17. Pursuant to Article 64(6)(b) of the Statute,³³ the Chamber has the power to compel witnesses to appear before it, thereby creating a legal obligation for the individuals concerned.³⁴ Furthermore, pursuant to Article 93(1)(b) of the

³⁰ Bemba First Response, ICC-01/05-01/13-1296-Conf, paras 4, 24-29.

³¹ Bemba Second Response, ICC-01/05-01/13-1291-Conf-Corr, paras 5 and 7.

³² Bemba Second Response, ICC-01/05-01/13-1291-Conf-Corr, paras 12, 13 and 18.

³³ Article 64(6)(b) of the Statute provides: '[i]n performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: [...] (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute'.

³⁴ Appeals Chamber, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598 ('Summons Judgement'), paras 107 and 113.

Statute,³⁵ the Court may request a State Party to both cooperate in serving the summons upon witnesses³⁶ and in compelling witnesses to appear before the Court sitting *in situ* in the State Party's territory or by way of video-link.³⁷

18. Any cooperation request to a State Party must satisfy the tripartite principles of (i) relevance, (ii) specificity and (iii) necessity.³⁸ In evaluating necessity in the context of whether to issue summonses to witnesses, the Chamber will consider both: (i) whether the anticipated testimony of the witness is potentially necessary for the determination of the truth and (ii) whether a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.³⁹

19. Finally, in respect of the specific offences alleged in the Case, the Chamber notes Article 70(2) of the Statute which stipulates that '[t]he conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State'.⁴⁰ At this juncture, the Chamber notes the Prosecutor's indications that [REDACTED] have confirmed: (i) their readiness to execute any request for cooperation that would entail compelling a witness to testify

³⁵ Article 93(1)(b) of the Statute provides: 'States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: [...] (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court'.

³⁶ Summons Judgment, ICC-01/09-01/11-1598, para. 114.

³⁷ Summons Judgment, ICC-01/09-01/11-1598, paras 128 and 132.

³⁸ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, [Trial Chamber V(a)], ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 181; *The Prosecutor v Uhuru Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, [Trial Chamber V(B)], ICC-01/09-02/11-908, 31 March 2014, para. 100, n 216; *The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, [Trial Chamber IV] ICC-02/05-03/09-504-Red, para. 4.

³⁹ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, [Trial Chamber V(a)], ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 181.

⁴⁰ See also Rule 167 of the Rules.

before the Court and (ii) that the necessary procedures and mechanisms are in place to do so, as appropriate.⁴¹

20. The Chamber will now turn to the instant Requests in order to determine whether they meet the aforesaid criteria.

21. As to relevance, the Chamber is satisfied by the Prosecution's arguments that the witnesses may testify to information relevant to the offences with which the accused have been charged in the Case, also noting that the satisfaction of this limb of the test is uncontested by the defence.

22. As to specificity, the Chamber is satisfied that the two witnesses have been clearly identified by the Prosecution and are, or may be, within the jurisdiction of [REDACTED].

23. As to necessity, the Chamber considers that the anticipated testimony of the witnesses is potentially necessary for the determination of the truth, noting that it goes to matters concerning, *inter alia*, corruptly influencing witnesses pursuant to Article 70(1)(c) of the Statute. Hence, the witnesses may provide noteworthy testimony on the individual responsibility of the accused for the offences alleged.

24. Moreover, the Chamber is also persuaded that summonses are necessary to obtain the testimony of the two witnesses. Contrary to what the Bemba Defence suggests, the Prosecution has detailed reasonable and unsuccessful attempts to obtain the voluntary cooperation of the witnesses. The information before the Chamber points to the witnesses maintaining their earlier uncooperative positions. In this vein it is noted that subsequent to the filing of the Requests, the Registrar reported that, between [REDACTED], "[t]he VWU attempted to contact witness P-198 several times to no avail", in order to

⁴¹ First Request, ICC-01/05-01/13-1237-Conf-Exp, paras 3 and 32; Second Request, ICC-01/05-01/13-1259-Conf-Exp, paras 3 and 22.

enquire whether he consents to being contacted by the Defence for Mr Kilolo,⁴² in line with the decision of the Chamber on the request of the Defence for Mr Kilolo to contact P-198.⁴³

25. [REDACTED].⁴⁴

26. The Chamber thus grants the requested summons.

27. With respect to the modalities of the testimony, the Chamber is not persuaded by the Babala Defence that it will not be sufficiently able to assess the credibility of the witnesses in the instant case via video-link. The Chamber notes that the Court's statutory documents provide for testimony via video-link. Moreover, the Appeals Chamber's judgment on the summoning of witnesses does not prefer either method (whether *in situ* or via video-link) for compelling the testimony of a witness over another.⁴⁵ Furthermore, given that the trial proceedings commenced on 29 September 2015, the Chamber must have regard to the most expedient manner of obtaining the testimony of the witnesses currently available to it (without undue prejudice to the proper administration of justice), which in its view is to allow the witnesses to appear via video-link.

28. The witnesses shall thus be summonsed to appear before the Court via video-link.

29. In respect of the disclosure request made by both defence teams, the Chamber concurs that pursuant to Rule 77 of the Rules, the records of contacts between the Prosecution and witnesses P-201 and P-198 are material to the preparation

⁴² Victims and Witnesses Unit's report on the implementation of the "Decision on Kilolo Defence Request to Contact P-198" (ICC-01/05-01/13-1268-Conf), ICC-01/05-01/13-1300-Conf, 25 September 2015, paras 1-4.

⁴³ Decision on Kilolo Defence Request to Contact P-198, ICC-01/05-01/13-1268-Conf, 18 September 2015.

⁴⁴ Prosecution's Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness, ICC-01/05-01/13-1237-Conf-Exp, para. 30.

⁴⁵ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Issuance of a Summons for Witness 727, [Trial Chamber V(a)], ICC-01/09-01/11-1817-Conf, para. 30, referring to the Summons Judgement.

of the defence, noting in particular that they may contain exonerating information. Given, however, that the Chamber has decided to issue the summons for both witness, there is no longer a specific reason as to why the disclosure of any communications between the Prosecution and [REDACTED] concerning P-201 is now warranted, since such disclosure was premised on the ground that it could possibly illuminate P-201's reluctance to testify and serve as a basis for alternate measures to a summons.

30. The disclosure requests are therefore granted in part, and the Prosecution is thus ordered to disclose all records of contacts with P-201 and P-198 (including written, audio and video material), but redactions may be applied by the Prosecution in accordance with the Protocol establishing a redaction regime in this Case.⁴⁶

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the relief sought in the Requests;

REQUIRES the appearance of witnesses P-201 and P-198 to testify before the Chamber by video-link on such dates and times as the Prosecutor or the Registrar (as the case may be) shall communicate to them;

REQUESTS the assistance of [REDACTED], in consultation with the Court in accordance with Article 93(3) of the Statute where necessary, in ensuring the appearance of witnesses P-201 and P-198 as indicated above, using all means available under the laws of [REDACTED], including:

- (i) to communicate to witnesses P-201 and P-198 the requirement of attendance as indicated above;
- (ii) to cooperate in serving the summons upon witnesses P-201 and P-198;

⁴⁶ Annex to the Decision on Modalities of Disclosure, ICC-01/05-01/13-959-Anx, 22 May 2015.

- (iii) to facilitate, by way of compulsory measure as necessary, the appearance of witnesses P-201 and P-198 for testimony before the Chamber by video-link on such dates and times as the Prosecutor or the Registrar (as the case may be) shall indicate; and
- (iv) to make appropriate arrangements for the security of witnesses P-201 and P-198, in consultation with the VWU in so far as possible, until their appearance and completion of testimony before the Chamber;

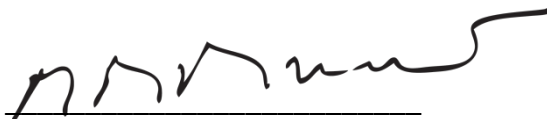
DIRECTS the Registry to prepare and transmit forthwith, in consultation with the Prosecutor, the necessary summonses to witnesses P-201 and P-198 (with or without the assistance of [REDACTED]) as well as the necessary cooperation request to the relevant authorities of [REDACTED] in accordance with Articles 70(2), 93(1)(d), 93(1)(l), 96 and 99(1) of the Statute and Rule 167 of the Rules, as specified in this Decision;

ORDERS the Prosecution to disclose to the defence all records of contacts with witnesses P-201 and P-198, including written, audio and video material, no later than five days after the notification of this Decision, in accordance with paragraphs 29 and 30 above.

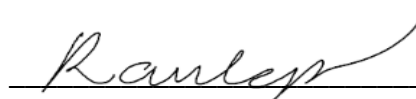
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 3 December 2015

At The Hague, The Netherlands