

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 31 August 2015

TRIAL CHAMBER VII

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

**Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the
Witness List**

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 54(1)(a) and 67 of the Rome Statute (the 'Statute'), Rules 76, 111 and 112 of the Rules of Procedure and Evidence ('Rules') and Regulations 23, 23 *bis*, 24(5) and 29 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List'.

I. Procedural background and preliminary issues

1. On 10 August 2015, the five defence teams in this case (collectively, the 'Defence') requested that two witnesses, P-198 and P-201, be struck from the Office of the Prosecutor's ('Prosecution') witness list based primarily on the non-disclosure of any statement, or even summary, of their anticipated testimony ('Request').¹ These witnesses testified for the defence in case ICC-01/05-01/08 (the 'Main Case') and are two of the fourteen witnesses who are the focus of the offences against the administration of justice with which the five accused are charged.
2. On 21 August 2015, the Prosecution responded to the Request ('Response'), submitting that the relief sought should be dismissed.²
3. On 28 August 2015, the Defence requested leave to reply to certain arguments raised in the Response.³
4. The Chamber notes that, in addition to joining the Request, the defence teams for Mr Kilolo and Mr Babala have filed supplemental submissions on the relief

¹ Joint Request to Strike Prosecution Witnesses P-198 and P-201 From the Witness List, ICC-01/05-01/13-1132-Conf.

² Prosecution Consolidated Response to Defence Requests in Relation to its Witnesses List, ICC-01/05-01/13-1168-Conf.

³ Joint Defence Request for Leave to Reply to Prosecution's Consolidated Response to Defence Requests in Relation to its Witness List (ICC-01/05-01/13-1168-Conf), 28 August 2015, ICC-01/05-01/13-1192-Conf.

sought.⁴ Regulation 23(1)(d) of the Regulations requires that documents filed with the Court ‘shall, as far as practicable, state [...] [a]ll relevant legal and factual issues [...] relied upon’. The Chamber considers that a party breaches the terms of Regulation 23(1)(d) by filing a request and then attempting to supplement their submission with additional legal and factual arguments which were available when the request was first filed.⁵ Such is the case with both of these additional submissions. The Chamber will therefore disregard them.

5. Further, in order to reach its decision, the Chamber does not consider it necessary to receive the additional submissions proposed in the Defence request for leave to reply. The Chamber therefore rejects this request.

II. Submissions

6. As grounds for requesting removal of P-198 and P-201 from the Prosecution’s witness list, the Defence submits that the Prosecution’s failure to obtain and disclose statements of P-198 and P-201 constitute violations of Rules 76 and 111 of the Rules, as well as Article 67(1)(a)-(b) of the Statute.⁶ The Defence observes that the Prosecution has not obtained the consent of P-198 or P-201 to testify, arguing that ‘[t]he 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.’⁷ The Defence also alleges that the Prosecution failed to conduct due diligence to obtain any statements and, with respect to P-198, implicitly discouraged him from giving a statement.⁸

⁴ 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), 20 August 2015, ICC-01/05-01/13-1163-Conf (with two annexes); Soumissions de la défense de monsieur Aimé Kilolo Musamba concernant le consentement de certaines témoins figurant sur la liste de témoins de du Procureur, 10 August 2015, ICC-01/05-01/13-1134-Conf-Red (confidential *ex parte* version filed same day).

⁵ See also Decision on Babala Defence Request for an Interpretation of the ‘Decision Regarding Interim Release’, 21 August 2015, ICC-01/05-01/13-1167-Conf, para. 2 n 3.

⁶ Request, ICC-01/05-01/13-1132-Conf, paras 1, 8-14.

⁷ Request, ICC-01/05-01/13-1132-Conf, para. 17.

⁸ Request, ICC-01/05-01/13-1132-Conf, paras 14-16.

7. The Prosecution responds that the relief sought is based on the erroneous premise that the Prosecution is obliged to take statements and seek consent from every witness it seeks to call.⁹ The Prosecution emphasises that the Defence has received adequate notice of its intent to rely on P-198 and P-201.¹⁰ The Prosecution also submits that any attempt to interview P-198 is ‘a mere futile investigative activity’ in view of his previous lack of cooperation with the Prosecution.¹¹

III. Analysis and conclusions

8. In evaluating the Request, the Chamber will consider whether the Prosecution’s conduct with respect to P-198 and P-201 has breached its disclosure or investigative obligations. Only if a breach is determined will the Chamber decide which remedy, if any, is appropriate.
9. Rule 76(1), first sentence, of the Rules provides that ‘[t]he 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’. By use of the word ‘any’, the provision’s plain language indicates that the Prosecution may satisfy its Rule 76(1) obligations when there are no prior statements to provide. Limiting Rule 76(1) in this manner also accords with the Appeals Chamber’s determinations that: (i) Rule 76 appears in a Chapter of the Rules pertaining to the Prosecution’s ‘obligations to disclose evidence or other material which **[it] has already collected**’¹² and (ii) witnesses can be compelled to testify before the

⁹ Response, ICC-01/05-01/13-1168-Conf, paras 4-9, 19.

¹⁰ Response, ICC-01/05-01/13-1168-Conf, paras 16-17.

¹¹ Response, ICC-01/05-01/13-1168-Conf, para. 16, n. 23.

¹² Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 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”, 17 February 2012, ICC-02/05-03/09-295, OA 2 (the ‘*Banda and Jerbo OA 2 Judgment*’) para. 22 (emphasis added).

Court,¹³ meaning that the Prosecution can seek the testimony of witnesses who have never cooperated with the Prosecution or consented to testify.

10. The only significant contrary authority presented by the Defence is a Trial Chamber II decision holding that it is incumbent upon the Prosecution to produce signed witness statements under Rule 111 of the Rules for all witnesses it wants to present at trial.¹⁴ However, the Appeals Chamber has subsequently held that it is reversible error to require the Prosecution to put all of its witness statements in the format provided by Rule 111 of the Rules.¹⁵
11. The Chamber therefore considers that the Prosecution is permitted to call witnesses when it has not obtained their consent to testify or collected any prior statements from them. Failing to take statements or obtain consent from P-198 or P-201 does not constitute a Rule 76 disclosure violation.
12. However, Article 54(1)(a) of the Statute provides that the Prosecution shall '[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'. The Chamber considers that this provision obligates the Prosecution to make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation.

translation", 17 February 2012, ICC-02/05-03/09-295, OA 2 (the '*Banda and Jerbo* OA 2 Judgment') para. 22 (emphasis added).

¹³ 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", 9 October 2014, ICC-01/09-01/11-1598, OA 7 OA 8.

¹⁴ ICC-01/04-01/07-1553, para. 35. Rule 111 governs 'Record of questioning in general' and sets out certain formal requirements for taking statements.

¹⁵ *Banda and Jerbo* OA 2 Judgment, ICC-02/05-03/09-295, para. 28. The decision reversed by this judgment contained a holding very similar to the one relied upon by the Defence. Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2011, ICC-02/05-03/09-214, para. 21 ('according to Rule 76 of the Rules read in conjunction with Rule 111 of the Rules, the prosecution is required to provide signed witness statements for all the witnesses it intends to rely on during the trial [...]').

13. The Chamber notes with concern the indications that the Prosecution tried to avoid pursuing P-198's statement, most notably by telling him during an interview that he was 'not to get into details about his role [played] or interactions with the ICC'.¹⁶ The Response does not detail the full efforts the Prosecution made to obtain statements from P-198 and P-201, other than mention that historical non-cooperation with P-198 made it futile to attempt to obtain a statement from him.
14. However, even if the Prosecution's conduct with P-198 and P-201 falls short of the Article 54(1)(a) standard, the Chamber considers that the prejudice caused by such a breach would be minimal in the present circumstances. The Defence has been well aware of these two witnesses' identities, the details of the underlying evidence of the incidents involving them, and their relevance to the charges for some time.¹⁷ Some of the accused are alleged to have personal interactions with these persons as Main Case defence witnesses, and much of the evidence on which the Prosecution intends to rely regarding P-198 and P-201 are allegedly intercepted communications with the accused. The Defence have been given timely access to the testimony of P-198 and P-201 in the Main Case.¹⁸ The Defence is also free to contact P-198 and P-201 in accordance with the Chamber's protocol for contacting opposing party witnesses.¹⁹ In this regard, the Chamber notes the Prosecution's submissions that these witnesses are adverse to it and that 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'.²⁰

¹⁶ OTP Investigation Report, CAR-OTP-0090-1779, at 1781.

¹⁷ Public Redacted version of "Document Containing the Charges", 30 June 2014, ICC-01/05-01/13-526-Conf-Anx B1, 3 July 2014, ICC-01/05-01/13-526-AnxB1-Red, paras 46-51 (P-0198) and paras 52-59 (P-0201) (notified 4 July 2014); ICC-01/05-01/13-597-Conf-AnxB, paras. 100-113 (P-0198) and paras. 114-130 (P-0201); ICC-01/05-01/13-749; ICC-01/05-01/13-1110-Conf, paras 65-81 (P-0198) and paras 82-106 (P-0201).

¹⁸ See generally Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", 27 May 2014, ICC-01/05-01/08-3074 (reclassified as public on 7 July 2014).

¹⁹ Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party and Witnesses of the Other Parties, 20 July 2015, ICC-01/05-01/13-1093-Anx, paras 35-37.

²⁰ Response, ICC-01/05-01/13-1168-Conf, para. 14.

15. For these reasons, the Chamber finds that the Prosecution's conduct with respect to P-198 and P-201 does not breach its disclosure obligations. Further, even if the Prosecution's conduct could be understood as falling short of its investigative obligations, the minimal prejudice caused to the Defence from such a breach does not justify striking these witnesses from the Prosecution's witness list.

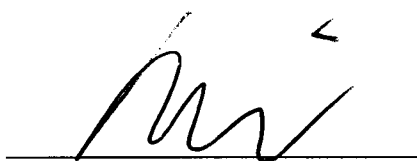
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence request for leave to reply;

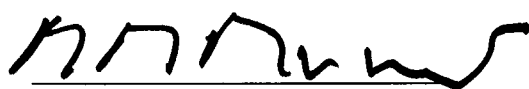
REJECTS the Request; and

ORDERS the Registry to reclassify the Request (ICC-01/05-01/13-1132-Conf), the Response (ICC-01/05-01/13-1168-Conf) and Annex C of the Response (ICC-01/05-01/13-1168-Conf-AnxC) as public.

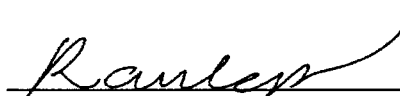
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 31 August 2015

At The Hague, The Netherlands