

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 31 January 2014

PRE TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

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

**Prosecution's Request pursuant to Regulation 35 of the Regulations of the Court
for variation of time limit for disclosure**

Source: The Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

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I. Introduction

1. Pursuant to Regulation 35 of the Regulations of the Court ("RoC"), the Office of the Prosecutor ("Prosecution") requests an extension of the 31 January 2014 deadline set by the Single Judge of Pre-Trial Chamber II ("Chamber") requiring the Prosecution's disclosure of all evidence on which it intends to rely for the confirmation proceedings.¹ Specifically, the Prosecution requests that the disclosure deadline for this newly obtained material on which it may rely during the confirmation proceedings be extended to 18 March 2014.

2. The requested extension is fully justified. *First*, the material is limited in scope, and comprises (a) material seized from some of the suspects provided to the Prosecution by the Registry on 28 January 2014 and (b) material provided on 23 January, pursuant to a Request for Assistance transmitted on 9 October 2013. *Second*, the material is highly relevant to the case and potentially to the formulation of the Document Containing the Charges ("DCC"), due 18 March.² *Third*, the delay in the Prosecution's receipt of this material was completely outside of its control. *Fourth*, the extension period requested is coextensive with the Chamber's view concerning material which the Prosecution has yet to receive, and is necessary to the Prosecution's ability to process, adequately review, assess and disclose any relevant material. *Finally*, granting the request will not unfairly prejudice the Defence. As such, good cause has been shown to grant the requested extension, within the terms of Regulation 35(2) of the RoC.

¹ ICC-01/05-01/13-T-2-CONF-ENG ET, 4 December 2013, p. 31.

² ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, pp. 14-15.

II. Confidentiality

3. This filing is classified as “Confidential” as it refers to material that is not yet accessible to the public.

III. Procedural history

4. On 23 November 2013, Aimé Kilolo, Jean-Jacques Mangenda, Fidèle Babala, and Narcisse Arido (“Suspects”) were arrested in Belgium, the Netherlands, the Democratic Republic of Congo and France, respectively, pursuant to a warrant of arrest issued by the Single Judge on 20 November.³ Pursuant to the warrant, the domestic authorities seized a number of items from the Suspects’ persons and/or related premises.

5. Certain materials seized in relation to Suspects Arido and Babala were transmitted to the Registry on 24 November. The Registry retained custody and control of these materials.

6. During the 4 December Status Conference, the Single Judge ordered the Prosecution to disclose by 31 January all evidence collected between 23 November and 31 January on which it intends to rely for the purpose of confirmation.⁴

7. On 13 December, the Single Judge appointed an Independent Counsel to review relevant seized materials for potentially privileged information.⁵

³ ICC-01/05-01/13-1-Red2-tENG, Public Redacted Version of the Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 5 December 2013.

⁴ ICC-01/05-01/13-T-2-CONF-ENG ET, 4 December 2013, p. 31; *See also* ICC-01/05-01/13-T-3-CONF-ENG ET, 5 December 2013, p. 13.

⁵ ICC-01/05-01/13-41-Conf-Red, Confidential Redacted Version of the Decision appointing an Independent Counsel and taking additional measures for the purposes of the forensic acquisition of material seized in the proceedings, 13 December 2013.

8. On 23 January 2014, the Prosecution received information and data concerning the email accounts of Arido, pursuant to an RFA initially issued on 9 October 2013. Subsequently, on 28 January, the Registry made available to the Prosecution some of the material seized from Babala and Arido.

IV. Submissions

A. The Requested extension is justified

9. Regulation 35(2) of the RoC states, in relevant part:

“The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard.”

10. Good cause exists here and the Chamber should grant the Request. The newly obtained evidence is limited, highly relevant and the requested extension appropriate to allow the Prosecution carefully to examine and assess it. In essence, the fact that the material was received within days of the disclosure deadline is a distinction without a difference, as compared to material that the Prosecution has yet to receive. Further, this evidence could not have been available to the Prosecution sooner for reasons completely beyond its control. Finally, the requested disclosure extension will not unfairly prejudice the Defence.

B. The evidence for which the extension is sought is limited

i) The contents of the Suspects' email accounts

11. On 9 October 2013, the Prosecution initially requested from France the contents of the Yahoo email accounts belonging to Arido. A second request for this material was made on 15 November 2013. The material was ultimately received on 23 January 2014. An initial review of the material is currently underway. Once complete, a full analysis of the email accounts will need to be conducted. However, the quantity of this material⁶ makes it impossible to complete this task by 31 January.

ii) Materials seized from Babala and Arido

12. On 28 January, the Registry granted the Prosecution access to some of the materials seized from Arido and Babala. For Arido, these comprise electronic copies of scanned documents and forensic copies of electronic materials, including telephones and a computer.⁷ For Babala, these materials comprise a USB stick.⁸

13. The forensic extraction and review of these materials has also begun and will require additional time to complete. The Prosecution cannot specify precisely how much time is required because the extraction process is ongoing and the quantity of material is as yet unknown. However, it is clear that the process cannot reasonably be completed by 31 January.

C. The materials are potentially highly relevant and probative

14. The potential relevance of this newly obtained material warrants the requested extension to allow for their careful review, assessment and disclosure. *First*, given the nature of the material, there is a strong likelihood that it will yield evidence highly probative of the charges against the Suspects. Some of it may colour the nature of

⁶ Arido's email account includes approximately 5,000 messages containing approximately 2,000 attachments and corresponding metadata.

⁷ The seized materials provided to the Registry following Arido's arrest, comprise a laptop computer; four USB sticks; four mobile telephones; a set of documents (about 70 pages in total), including bank statements and notes.

⁸ The seized materials for Babala also include an I-Pad which has not yet been made available to the Prosecution.

their culpability. Affording the Prosecution sufficient time to review this material and to assess its relevance carefully and thoroughly is in the interests of justice. For example, just this morning, a cursory review of Arido's email account yielded evidence directly relevant to and probative of the charge of presenting falsified and/or forged evidence in the *Bemba* case, as alleged in the warrant. Further analysis of this newly obtained material is essential.

15. *Second*, the Prosecution has a duty under Article 54(1)(a) of the Rome Statute ("Statute") to investigate objectively (covering both incriminating and exonerating circumstances) in order to establish the truth, as well as a duty under Article 61(5) of the Statute to present at confirmation "sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged". The Prosecution's ability to meet these obligations may be compromised if it is not able to review or analyse material which all indications suggest is highly relevant to and probative of the charges. Further, without a full overview of all the pertinent evidence, the Prosecution will lack insight into crucial evidence potentially affecting its case theory or the formulation of charges against the Suspects.

16. As noted, the contents of Arido's email accounts preliminarily show that they contain evidence material to this case. The Prosecution reasonably believes that the items seized from Babala will similarly yield evidence directly pertinent to the charges. It is therefore critical that the Prosecution be given sufficient time to review these materials such that it may rely on any highly relevant evidence derived for the confirmation proceedings. This will ensure the Prosecution's ability to comply with its duty of objectivity in the investigation and allow it an opportunity to adduce evidence that, in its judgement, may help meet its burden at confirmation regarding all the Suspects.

D. Good cause exists as the Prosecution was unable to obtain the evidence sooner for reasons outside of its control

17. The timing of the Prosecution's receipt of the seized materials relating to Suspects Arido and Babala, as well as the materials provided in response to the RFA concerning Arido, was beyond the Prosecution's control. In the circumstances, it is simply not possible for the Prosecution to process, review, assess and disclose these materials (which are very likely significant) before 31 January.

18. As noted, the contents of Arido's email accounts were first requested from the French authorities in early October 2013. The second request in November 2013 similarly failed to yield a timely result. Upon inquiry, the Prosecution learned that the response was delayed for apparently governmental administrative reasons.⁹

19. As concerns the items seized from Babala and Arido, these were originally received by the Registry on 24 November 2013. They were made available to the Prosecution on 28 January 2014. Given its nature and scope (which has yet to be ascertained forensically), it is unclear whether the Prosecution would have been able to complete the review of this material even had it been received earlier.

20. In any event, the receipt of this material at this very late stage places the Prosecution in a position no different than had the material simply not arrived until after the deadline's expiry. The consequence should therefore be no different, and the 18 March 2014 deadline should apply.¹⁰

⁹ The Prosecution inquired with the French authorities on several occasions as to the status of the execution of the RFA.

¹⁰ See ICC-01/05-01/13-135, Decision on the "Prosecution's notice of receipt of communication from Dutch authorities concerning seized material" and related filings, 28 January 2014, p.6.

E. The Defence will not be prejudiced by the granting of an extension

21. Granting the requested extension will cause no unfair prejudice to the Defence in this case.

22. *First*, as noted, in the circumstances the requested extension amounts to nothing more than a distinction without a difference relative to the 18 March disclosure deadline for material not yet in the Prosecution's possession. Further, given the amount of evidence already disclosed to the Defence and the amount of material to which the Prosecution has yet to be provided access, granting an extension to disclose this limited material will not significantly affect the Defence's preparation for the scheduled confirmation.

23. *Second*, the contents of some of the evidence that the Prosecution has yet to analyse are well known to the Suspects, as they comprise their respective personal items. The same applies to any potential communications among the Suspects that may be found within the seized devices.

F. An extension is in the interests of justice

24. The interests of justice favour a confirmation process that is as accurate, efficient and fair as possible. The requested extension will allow the Prosecution to discharge its obligations under the Court's procedural framework; provide the Prosecution with the ability to make an independent and fair assessment of the evidence necessary to meet its burden for the confirmation proceedings; afford the Chamber the ability to assess the best evidence available during the confirmation process; and will not result in any prejudice to the Defence.

V. Requested Relief

25. For the foregoing reasons, the Prosecution requests an extension of the time limit for disclosure of materials collected between 23 November 2013 and 31 January; and, in respect of the newly obtained material indicated above, that the 18 March deadline for the disclosure of material acquired by the Prosecution after 31 January apply.



Fatou Bensouda, Prosecutor

Dated this 31st Day of January 2014

At The Hague, The Netherlands