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Pénale
Internationale**



**International
Criminal
Court**

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Date: 5 March 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***

Public Redacted Document

**Public Redacted version of "Prosecution's Request for Variation of Time Limits
Pursuant to Regulation 35 of the Regulations of the Court Concerning the
Confirmation of Charges", 3 March 2014, ICC-01/05-01/13-234-Conf**

Source: The Office of the Prosecutor

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I. Introduction

1. The Prosecution requests a four-month extension of the deadlines set by the Pre-Trial Chamber (“Chamber”) concerning the scheduling of proceedings regarding the confirmation of charges,¹ pursuant to Regulation 35 of the Regulations of the Court (“RoC”). Several factors beyond the Prosecution’s control have rendered the schedule set in early December 2013 untenable.

2. In brief, the factors underpinning the Prosecution’s Request comprise, *inter alia*, its: (i) continuing lack of access to relevant evidence, seized pursuant to the Warrant of Arrest;² (ii) delayed access to evidence only recently and partially made available by the Registry; (iii) consequential inability timely to discharge obligations arising under Articles 54 and 67 of the Rome Statute (“Statute”) and Rule 77 of the Rules of Evidence and Procedure (“Rules”); (iv) consequential inability to proceed to the confirmation process in a ‘trial ready’ posture; and (v) the imminent transfer of the fifth suspect to the seat of the Court.

3. All of these factors necessitate and justify the requested extension. Further, granting the extension will not unfairly prejudice the Defence. To the contrary, it will promote the fairness and expedition of the proceedings, as well as facilitate the Chamber’s search for the truth and the Prosecution’s corresponding duty to establish it in this case.

¹ ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, p.15; 4 December 2013, p. 9 and 31; ICC-01/05-01/13-T-2-Red-ENG, 4 December 2013, p. 9 and 31; see also ICC-01/05-01/13-T-3-Red-ENG, 5 December 2013, pp. 6 and 13.

² 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 (“Warrant”).

II. Confidentiality

4. This filing is classified as “Confidential” as it refers to material that is not yet available to the public. A “Public” redacted version will be filed.

III. Procedural history and background

5. On 23 and 24 November 2013, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido (“Suspects”) were arrested in Belgium, The Netherlands, The Democratic Republic of the Congo (DRC) and France, respectively, pursuant to the Warrant issued by the Single Judge on 20 November. Under the Warrant’s terms, the respective domestic authorities seized items relative to the arrests, of which relevant materials were to be transmitted to the Court.

6. As of 24 November 2013, the materials seized in relation to Suspects Arido and Babala were transmitted to the Registry. The Registry retained custody and control of these materials.

7. During the Suspects’ First Appearance and subsequent Status Conferences in December, the Single Judge set the dates for pre-confirmation disclosure, the filing of the Document Containing the Charges (DCC) and for the parties’ confirmation submissions (“Scheduling Order”).³ The Single Judge also announced his intention to appoint an independent counsel to review the relevant seized materials. The appointment was made on 13 December.⁴

³ ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, p.15; 4 December 2013, p. 9 and 31; ICC-01/05-01/13-T-2-Red-ENG, 4 December 2013, p. 9 and 31; see also ICC-01/05-01/13-T-3-Red-ENG, 5 December 2013, pp. 6 and 13.

⁴ ICC-01/05-01/13-41-Red, 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, reclassified as “Public” on 3 February 2014 (“Order on Independent Counsel”).

8. At the 4 December Status Conference, the Prosecution outlined several factors affecting the pre-confirmation schedule, including: the disposition of the seized materials; the vetting of potentially privileged material; the accessibility of certain potentially privileged Detention Centre audio recordings; the time required for necessary translation and transcription; pending Requests for Assistance (RFA); the need for the Prosecution's continued limited and focused investigation; and the Prosecution's need to review all the outstanding materials to discharge its obligations under Article 54(1)(a) of the Statute, and to implement its policy to proceed to confirmation in a 'trial ready' posture.⁵

9. On 23 January 2014, the Prosecution received information and data concerning the email accounts of Suspect Arido, pursuant to a request for assistance (RFA) issued on 9 October 2013.

10. Subsequently, on 29 January, the Registry made available to the Prosecution certain material in its custody, seized from Babala and Arido. The Registry made additional material from these seizures available to the Prosecution on 11 February.

IV. Submissions

A. The Requested extension is justified

11. 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."

⁵ ICC-01/05-01/13-T-2-Red-ENG, p.7, line 13 to p.12, line 25.

12. There is good cause for the Prosecution's Request, and the Chamber should grant the extension. First, the Prosecution's lack of access to a vast amount of information and evidence likely material to and highly probative of issues arising in this case continues unabated. This material has remained in the custody and control of the Dutch and Belgian authorities since the Suspects' arrests. The Prosecution has never had access to it and there is still no certain indication when it might.

13. Second, several seized electronic devices, provided to the Registry on or about 24 November 2013, have only been recently forensically copied and partially made available to the Prosecution. The first of this material was made available on 29 January 2014. Copies of additional material were made available on 11 February, following the completion of additional forensic extractions carried out by the Registry. However, these are not problem-free and will require time to analyse and evaluate. Further, extractions from additional devices have yet to be successfully done by the Registry and the extracted material provided to the Prosecution.

14. As a direct consequence of the inaccessibility and delayed accessibility of these materials to the Prosecution, the Prosecution is not reasonably in a position meaningfully to discharge its obligations under the Statute and Rules within the timeframes established in the Scheduling Order. Further, the Prosecution is not in a position to assess these materials and carefully evaluate them as is necessary to formulate and draft the DCC within the current deadline.

15. Moreover, in these circumstances the Prosecution cannot reasonably commence the confirmation process in anywhere near a 'trial ready' posture. Proceeding on the Scheduling Order means performing a substantial portion of the investigative and analytical work post-confirmation. This will considerably delay the commencement of trial and adversely affect the parties' efficient preparation. Although the Scheduling Order was intended to ensure the smooth and efficient presentation of

the case, without modification given the circumstances, it will become an obstacle to a trial that is both expeditious and fair.

16. Lastly, the Prosecution notes that the joinder of Narcisse Arido to the proceedings is imminent, his final appeal to the *Cour de Cassation* in France to avoid his surrender to the Court having recently failed.

B. The Prosecution lacks access to most of the seized material

17. As noted, in executing the Warrant against the Suspects, Belgian, DRC, French, and Dutch authorities, respectively, seized certain materials on 23 and 24 November 2013.

18. Materials seized by French and DRC authorities relating to Arido and Babala were transmitted to the Registry on 24 November. They remained in the custody and control of the Registry, which only recently provided the Prosecution access to some of it, as detailed below.

19. However, a vast quantity of electronic material seized by the Dutch and Belgian authorities in November 2013 has yet to be transmitted to the Court and, in turn, to the Prosecution. The Prosecution is not in possession of a comprehensive list of items, but estimates that the material comprises at least the following electronic devices:

- [REDACTED].

20. With the DCC due on 18 March and the Prosecution's confirmation submissions slated for 18 April, at this late stage it is still not possible to determine with any certainty how much time it will take for the respective domestic jurisdictions to process the seized material and transmit it to the Court.

21. On 25 February, upon inquiry, the Dutch [REDACTED] informed the Prosecution that [REDACTED]. The Prosecution is unaware of any estimate provided for transmission of seized materials in possession of the Belgian authorities. While the capacities of the seized devices are finite, how much data they actually hold is anyone's guess. Similarly, how long it might take to complete the necessary forensic electronic extraction process domestically is unknown. Further, following the eventual transmission of the material by the Dutch and Belgian authorities to the Court, it remains to be seen how much time the Independent Counsel appointed by the Chamber will require to carry out his/her broad mandate to review the material for privileged information.⁶

22. Ultimately, it is an open question when the Prosecution might receive the material and how much time it will need to assess, analyse and process it for relevance and disclosure purposes, pursuant to its obligations under the Court's procedural framework.

23. Significantly, the Prosecution has no ability to affect the availability of the seized materials in Dutch and Belgian custody. And, it appears the Chamber is similarly situated. Like the Chamber, the Prosecution is obliged to respect these authorities' compliance with national laws and procedures concerning the transmission of the seized materials, however inconvenient the result. Thus, unless the Chamber grants the requested extension the Prosecution will have no reasonable opportunity to examine, assess and analyse likely highly relevant and probative evidence within the seized materials, as is both prudent and in line with its obligation with regard to the full investigation of the crimes alleged and the fair

⁶ Order on Independent Counsel, p.6 (requiring, *inter alia*, the review of documentary and electronic items seized during the search of Bemba's cell and person; materials seized during the arrest operations involving Kilolo and Mangenda, including electronic devices and other items seized from Kilolo and Mangenda's respective residences and persons, and materials and electronic devices seized during the search of their ICC Defence offices).

presentation of this case.

C. The Prosecution lacks access to other important evidence

24. So far the Prosecution has received two reports of the independent counsel assigned to review potentially privileged intercepted conversations pursuant to the Chamber's Order.⁷ The reports cover the period [REDACTED].⁸ The Prosecution is expecting a further report covering the period [REDACTED].

25. The Independent Counsel's reports have yielded evidence critical to the case and will form a part of the basis upon which the DCC rests. The Prosecution reasonably anticipates that a further report covering the last period will produce similarly cogent evidence. The final report, like the two preceding it, will have to be reviewed and the underlying intercepts obtained, analysed, disclosed and transcribed, as necessary. Also, the report and its underlying material will have to be cross-referenced against other significant documents, data and other evidence obtained by the Prosecution thus far.

26. Even if the Prosecution were to receive the report of the Independent Counsel and the underlying materials tomorrow, there would be insufficient time to carry out the necessary review and analysis for their incorporation into the DCC or for their effective use during the confirmation process. It is clear that the Prosecution will not receive either the report or the underlying audio recordings tomorrow. Here again, upon inquiry the Dutch [REDACTED].

27. The Prosecution continues to await several responses to RFAs from the

⁷ ICC-01/05-52-Red2, Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", 29 July 2013, pp. 7-8, reclassified as "Public" on 3 February 2014.

⁸ [REDACTED].

[REDACTED] authorities. Specifically, the materials concerned comprise, *inter alia*, [REDACTED]⁹ [REDACTED].

28. Proceeding on the Scheduling Order without any meaningful opportunity, if at all, for the Prosecution to examine and assess the last report of the Independent Counsel courts serious future delay in these proceedings. Should the report yield material evidence in the case (which is highly likely), omitting its consideration now may later require an amendment of the DCC, a re-confirmation process, or other procedural measures.

29. At the very least, proceeding this way will impede the Prosecution's ability to establish the truth through an objective investigation required under Article 54(1)(a) of the Statute, and potentially deprive the Prosecution of some of its best evidence (*i.e.*, the words of the Suspects themselves) toward meeting its burden under Article 61(5) of the Statute. Granting the requested extension would obviate this result.

D. There is insufficient time meaningfully to assess and analyse newly received evidence

30. As noted in a previous filing, in [REDACTED] the Prosecution requested the assistance of [REDACTED] to obtain the contents of Arido's [REDACTED] email accounts. Following a second request in [REDACTED], the material was furnished on 23 January 2014.¹⁰ An initial review of the email accounts began immediately.

31. The Prosecution completed its review of Arido's emails just last week, which confirms the presence of evidence material to the charges in this case. For example,

⁹ [REDACTED].

¹⁰ ICC-01/05-01/13-140-Conf, Prosecution's Request pursuant to Regulation 35 of the Regulations of the Court for variation of time limit for disclosure, 31 January 2014, paras. 11 and 18.

[REDACTED]. To complete its analysis however, the Prosecution needs minimally to compare the emails reviewed to the seized materials which the Registry has only recently made available, as set out below.

32. On 29 January 2014, the Registry provided the Prosecution access to extracted copies of some of the electronic devices seized in relation to Arido and Babala. For Arido, the seized devices comprise:

- [REDACTED].

33. Of these devices, the Prosecution received copies of the [REDACTED] on 29 January 2014.

34. On 11 February 2014, the Registry provided the Prosecution with an extracted copy of [REDACTED]. The Registry has been unable to extract copies of the [REDACTED]. The forensic copy of the [REDACTED] contains a vast amount of information which the Prosecution has begun analysing. Although it is not yet known what the device holds, it is highly probable that, like Arido's email account, it contains information directly relevant to the charges in this case.

35. The materials seized from Babala comprise:

- [REDACTED].

36. Of these devices, the Registry provided the Prosecution with [REDACTED] on 29 January 2014. A copy of his [REDACTED] was made available on 11 February 2014. The Prosecution is in the process of reviewing this material. As with Arido's material, the prognosis of this analysis can only be imprecise at this point, and requires additional time.

37. As noted, the Prosecution's forensic extraction and review of all material newly

furnished (*i.e.*, from the [REDACTED] authorities and the Registry) began promptly. But, it involves several technical steps as well as detailed analysis to insure its integrity and accuracy. The manner in which the Registry provided the Prosecution with some of these materials has complicated the process. For example, [REDACTED].

38. An extraction report recently made available by the Registry also leaves certain significant questions unresolved. For example, [REDACTED].¹¹ Other, more technical, problems currently prevent the technical verification of electronic data in relation to the acquisition of mobile phone data. Given more time, these problems can be fully resolved.

39. The Prosecution is nevertheless proceeding as diligently and quickly as it can, despite these problems. However, it is still not yet possible to give an accurate assessment of how much more time is required for the Prosecution to extract, review, analyse and process this newly provided material. At this point, even its quantity is unascertained. What is certain, though, is that the Scheduling Order precludes any prospect of a meaningful review and analysis of this material, much less a complete one.

40. The Prosecution's examination of some of the newly provided material indicates that the seized electronic devices (both those available and unavailable) are bound to contain highly relevant and probative material. As such, the Chamber should afford the Prosecution a reasonable opportunity to review and analyse the seized material in advance of submitting the DCC. This material may very well shape the document itself, as well as inform the Prosecution's decisions on Rule 77 and Article 67(2) disclosure, and the evidence on which it will rely for confirmation.

¹¹ [REDACTED].

41. Allowing the Prosecution a reasonable opportunity to review the seized material benefits the proceedings as a whole — it is in the interests of justice and promotes not only the fairness and expeditious conduct of the proceedings, but advances the truth-seeking function of the Court and the Prosecution's corresponding responsibility to establish it.¹² Bemba's Detention Centre account record recently provided by the Registry is a case in point. Although the record does not undercut the Prosecution's case against Mangenda, they underscore the need to proceed in this case circumspectly.¹³

E. Without an extension of time the Prosecution will be unable to effectively the discharge its obligations arising under the Statute and the Rules

42. As the Prosecution lacks access to most of the seized materials at this stage, obviating their need to be disclosed, the Prosecution is nevertheless bound by Article 54(1)(a) of the Statute, particularly as the materials were seized upon the Chamber's order [REDACTED].¹⁴ The materials therefore comprise the fruit of the Prosecution's investigative activities and may yield both incriminating and exonerating information.

43. The Prosecution should not be compelled to forgo the review of the seized material in advance of filing a DCC (which may be substantively affected by the outstanding information) and to proceed nevertheless with the confirmation of the charges.

¹² See Article 54(1)(a).

¹³ ICC-01/05-01/13-179, Prosecution request to obtain evidence from the Detention Centre, 12 February 2014; ICC-01/05-01/13-198 and ICC-01/05-01/13-198-Conf-AnxA, Defence provision of information pursuant to decision ICC-01/05-01/13-185, 16 February 2014; and ICC-01/05-01/13-218, *Rapport à la Chambre suite à la «Décision on the "Prosecution request to obtain evidence from the Detention Centre" dated 12 February 2014 »* and ICC-01/05-01/13-218-Conf-Anx, 24 February 2014.

¹⁴ [REDACTED].

44. If the Prosecution is to proceed without having even seen the fruits of its investigation, this would undermine the purpose of the seizure in the first place, which the Single Judge considered “may assist the Prosecutor to discharge the investigative duties cast on her by article 54(1)(a).”¹⁵

45. Further, when the Warrant was issued, the Single Judge contemplated that “those States which will arrest the persons concerned must ... be requested promptly to transmit to the Court any evidence seized on the occasion.”¹⁶ He thus issued an order to that effect. The underpinnings of that order to “seize and transmit to the Court any relevant evidence”¹⁷ have not changed and obviously informed the Scheduling Order.

46. However, the Chamber could not reasonably have anticipated the Prosecution’s continued lack of access to most of the seized materials and its grossly delayed access to some at this late stage. Taking account of these circumstances, granting the Request would advance the fairness of the proceedings, justifiably placing substance before form — justice over procedure.

47. In respect of the material to which the Prosecution has only recently gained access, a substantial amount of additional time for its review, assessment and analysis is necessary for the reasons set out above. Depriving the Prosecution of this opportunity will not only impede its ability meaningfully to discharge its obligations under Article 67(2) and Rule 77, but also prevent its evaluation of evidence potentially affecting its case theory, the formulation of charges, and possibly its ability to meet its obligation under Article 61(5) of the Statute for one or more Suspects in this case.

¹⁵ Warrant, para. 26 (emphasis added).

¹⁶ Warrant, para. 26.

¹⁷ Warrant, p. 16.

F. The Prosecution will be unable to proceed to confirmation in a ‘trial ready’ posture without the requested extension

48. As noted above, the inaccessibility of most of the seized materials to the Prosecution and its late and limited access to the remainder will, at this stage, leave the Prosecution not ‘trial ready’ at the commencement of the confirmation proceedings as scheduled.

49. Although the Prosecution has the inherent power to continue its investigations after the confirmation of charges as necessary for its case and to determine the truth,¹⁸ “[p]arties and participants in a case are expected to prepare on the basis of the charges as confirmed which shape the subject-matter of the case, and thus, to take into consideration the evidence that is only relevant to the charges confirmed.”¹⁹

50. Here, the Prosecution has not had the benefit of the seized material and a fair opportunity to exploit materials only recently made available. Proceeding to confirmation without having fully examined evidence reasonably expected to inform the DCC, and which likely will comprise substantive supporting evidence, risks an even greater inefficiency to the proceedings than the requested extension. Going forward on the Scheduling Order opens every possibility that a post-confirmation amendment to the DCC, or a re-confirmation process, may become necessary, along with all of the associated litigation in this multi-suspect case.

51. It is the Prosecution’s policy to proceed to confirmation in a ‘trial ready’

¹⁸ See ICC-01/09-01/11-859, Decision on the "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", 16 August 2013 (“DCC Amendment Decision”), para. 34.

¹⁹ DCC Amendment Decision, para. 40.

posture.²⁰ This policy is set out in the Prosecution's Strategic Plan for June 2012 to 2015, which provides, *inter alia*, that:

[The Prosecution] will aim at presenting cases at the confirmation hearing that are as trial-ready as possible. If meeting such a threshold is not possible at the moment of applying for an arrest warrant or a summons to appear, the Office intends to only proceed with the application if there are sufficient prospects to further collect evidence to be trial ready within a reasonable timeframe.²¹

52. Proceeding in this way allows cases to move speedily to trial following confirmation, promoting both the efficiency and fairness of the proceedings before the Court.

53. While it appeared that the Prosecution would have a fair opportunity to collect and review the seized materials within a reasonable period following its application for an arrest warrant, that assumption has proven incorrect due to an unanticipated confluence of circumstances outside the Prosecution's control. However, this does not mean the Prosecution should be placed in a position to abandon the fruit of its investigation and present a case at confirmation without review of a voluminous relevant body of evidence, which may affect the Prosecution's full understanding of its own case.

54. Recognising that there will be cases before this Court when evidence is simply not available at the time of confirmation, this case is distinct. Here, the evidence is already seized. It is secure. And, it is in the process of actually being made available.

²⁰ Remarks to the 23rd Diplomatic Briefing, James K. Stewart, Deputy Prosecutor of the International Criminal Court, 29 May 2013, p. 2.

²¹ International Criminal Court Office of the Prosecutor Strategic plan June 2012-2015, 11 October 2013, para. 4(a) and paras. 18-24, Available at, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf.

Proceeding to the exclusion of evidence likely material to the case will be counter-productive ultimately, leaving serious unresolved procedural and evidentiary issues to the trial stage and defeating the purpose of the Scheduling Order.

G. Arido's transfer to the Court is now imminent

55. The Prosecution has learned that on 18 February Arido's final appeal in his effort to avoid surrender to the Court failed before the *Cour de Cassation*. His transfer is thus imminent. As Arido has yet to take part in any of the pre-confirmation proceedings, his joining the case at this stage will cause delay, if for no other reason than to permit his Defence a reasonable opportunity to come up to speed and to exercise its procedural rights as appropriate. Thus, granting the Request will also accommodate this anticipated delay.

H. An extension will not unfairly prejudice the Defence and is in the interests of justice

56. Granting the requested extension will cause no unfair prejudice to the Defence. The Defence has a clear interest in the Prosecution's ability reasonably to investigate this case pursuant to Article 54(1)(a) of the Statute. Further, the Defence has an interest in examining for themselves seized materials yet to be transmitted to the Court, to which they may be entitled. Both the parties and the proceedings will benefit from a reasonable opportunity to review and assess the seized material and other material yet unavailable, as this will promote the efficiency and fairness of the confirmation and trial proceedings.

57. Further, the interests of justice favour a confirmation process that is as accurate, efficient and fair as possible. Granting the Request will permit the Prosecution to carry out its obligations under the Court's procedural framework effectively, to

frame the DCC having regard to the totality of the evidence produced by its investigation, and to support the confirmation of charges with the best evidence at its disposal.

58. It is to no one's advantage that this case proceed hastily through the confirmation process only to become mired in delay once the seized and other materials become available to the Prosecution and the respective Defences.

I. Interim status conference

59. Should the Chamber be inclined to grant the Prosecution's Request, the Prosecution proposes that a status conference be held six weeks following the Chamber's order, or at such other time(s) the Chamber deems appropriate. This will allow sufficient time for a reasonable assessment of any continuing difficulties and for the Chamber to be thus apprised of the state of the parties' preparation and continuing issues affecting the new schedule.

60. The Prosecution notes that in addition to the serious problems concerning its access to evidentiary material and the consequences to its preparedness, there remain other difficulties that need to be resolved as well. These include complex technical challenges relating to material provided by the Registry, such as the Detention Centre recordings and the data extractions concerning the seized materials mentioned above. In addition, there are additional materials which have yet to be produced by cooperating states pursuant to RFAs for relevant material issued in some cases months ago. As these issues have not yet been resolved and continue to adversely affect the Prosecution's ability to meet the demands of the Scheduling Order, the Prosecution considers that a status conference would be beneficial.

V. Requested Relief

61. For the foregoing reasons, the Prosecution requests a four-month extension of the time limits set out in the Scheduling Order.



Fatou Bensouda, Prosecutor

Dated this 5th Day of March 2014

At The Hague, The Netherlands