

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 5 August 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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU ET NARCISSE ARIDO***

URGENT

Public Document

**Defence response to Prosecution's Request for Variation of Time Limit for
Confirmation Response ICC-01/05-01/13-608**

Source: Defence for Mr Aimé Kilolo Musamba

Document 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 Aimé Kilolo Musamba

Mr Ghislain Mabanga

Counsel for Jean-Pierre Bemba Gombo

Mr Nicholas Kaufman

Counsel for Jean-Jacques Mangenda Kabongo

Mr Jean Flamme

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Göran Sluiter

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. *Purpose:* This Response (“Response” or “Defence Response”) is hereby submitted by the Defence of Mr Aimé Kilolo Musamba (“Kilolo Defence” and “Mr Kilolo” respectively) to the Pre-Trial Chamber II of this Court pursuant to Regulation 24(1) and Regulation 34(b) of the Regulations of the Court, strenuously opposing the untimely and unsubstantiated Prosecution filing requesting a variation of time limit for its confirmation response ICC-01/05-01/13-608 (“Prosecution Extension Request”).
2. *Structure:* This Response will dispense with the procedural posture of this case, and will address only the Defence’s unequivocal opposition to the Prosecution Request. Hereinafter, all references to “the Suspects” shall refer collectively to Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido.

II. DISCUSSION

1. On 27 November 2013¹, 4 December 2013², and 5 December 2013³, the Pre-Trial Chamber set out a schedule of proceedings regarding the confirmation of charges, and which determined the dates for pre-confirmation disclosure, the filing of the Document of Charges, and for the parties’ confirmation submissions. This schedule, set out in late November 2013, was intended to guarantee the Suspects a speedy trial in accordance with the rights enshrined in and guaranteed under the statutory framework of this Court, specifically Article 61(1), which mandates that the confirmation of charges hearing be held “within a reasonable time after the person’s surrender or voluntary appearance before the

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

² 4 December 2013, p. 9 and 31 ; ICC-01/05-01/13-T-2-Red-ENG, 4 December 2013, p. 9 and 31.

³ ICC-01/05-01/13-T-3-Red-ENG, 5 December 2013, pp. 6 and 13.

Court”.⁴ According to this original schedule, the confirmation of charges hearing was scheduled to commence on 18 March 2014.⁵ At the time the Single Judge determined such confirmation schedule, the Prosecution made abundantly clear that it was in an advanced stage of its “very narrow and focused investigation, very targeted”⁶, and which it expected would continue “right up and through perhaps the end of February”⁷. Indeed, the Prosecution emphasized that though it intended to continue investigating the case, it would *not be* for the “purposes of expanding the scope of the investigation itself, [but] rather for *closing the investigation and tying up any loose ends that may be there*”.⁸

2. On 3 March 2014, the Prosecution filed the ‘Prosecution’s Request for Variation of Time Limits Pursuant to Regulation 35 of the Regulations of the Court Concerning the Confirmation of Charges’ (‘First Prosecution Request’), requesting an extension of *four months* of the deadlines set by the Pre-Trial Chamber.⁹ In this First Prosecution Request, the Prosecution lamented “several factors beyond the Prosecution’s control have rendered the schedule set in early December 2013 untenable”¹⁰, in an attempt at aligning itself with the requirements of Regulation 35, which regulates such extensions, and which, as the Prosecution itself rightly noted¹¹, requires that *good cause* be shown. At the time of its filing, the Prosecution expounded that its extension request would not unfairly prejudice the Defence, but rather, it very benevolently reasoned that the extension would “[t]o the contrary...promote the fairness and expedition of the

⁴ Rome Statute, Article 61(1).

⁵ ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, p.15, l. 7-9.

⁶ ICC-01/05-01/13-T-2-CONF-ENG, p. 9, l. 21.

⁷ ICC-01/05-01/13-T-2-CONF-ENG, p. 9, l. 22.

⁸ ICC-01/05-01/13-T-2-CONF-ENG, p. 9, l. 17-19 (emphasis added).

⁹ ICC-01/05-01/13-234-Conf.

¹⁰ ICC-01/05-01/13-234-Conf, para. 1.

¹¹ ICC-01/05-01/13-234-Conf, paras. 11-15.

proceedings, as well as facilitate the Chamber's search for the truth and the Prosecution's corresponding duty to establish it in this case."¹²

3. It should be noted that all the respective Defence teams "most strenuously"¹³ opposed the Prosecution's request.¹⁴
4. On 14 March 2014, the Single Judge rendered his 'Decision on the "Prosecution's Request for Variation of Time Limits Pursuant to Regulation 35 of the Regulations of the Court Concerning the Confirmation of Charges" dated 3 March 2014' (First Extension Decision), in which the Single Judge amended the calendar for the confirmation of charges in writing, affording the Prosecutor until **30 May 2014** for the filing of her document containing the charges and list of evidence.¹⁵ The Defence teams were thus forced to reconsider and realign their respective defence strategies and calendars to account for this more than two months postponement in the confirmation schedule.
5. On 28 May 2013, two days prior to the date on which the Prosecutor was obliged to submit the Document Containing the Charges, the Single Judge rendered another 'Decision amending the calendar for the confirmation of the charges', in which he found appropriate to amend the calendar for the confirmation of charges by one full month, such that the Document Containing the Charges would not have to be filed until **30 June 2014**. Specifically, the Single Judge:

DECIDES to amend the calendar for the confirmation of the charges in writing as follows:

¹² ICC-01/05-01/13-234-Conf, para. 3.

¹³ ICC-01/05-01/13-245, para. 1.

¹⁴ ICC-01/05-01/13-241-Conf; ICC-01/05-01/13-242-Conf; ICC-01/05-01/13-245; ICC-01/05-01/13-248-Conf; ICC-01/05-01/13-250-Conf.

¹⁵ ICC-01/05-01/13-255, p. 7.

- *the Prosecutor shall have until 30 June 2014 for the filing of her document containing the charges and list of evidence;*
- *the Defence teams shall have until 15 July 2014 for the filing of their respective lists of evidence, if any;*
- *both the Prosecutor and the Defence teams shall have until 30 July 2014 for the filing of their written submissions in lieu of hearing;*
- *the Prosecutor shall have until 7 August 2014 for the filing of her reply to the written submissions of the Defence teams;*
- *the Defence teams shall have until 14 August 2014 for the filing of their reply to the Prosecutor's written submissions;*

6. It should be noted that from the outset, the Single Judge had determined the confirmation schedule along the following pattern: the Document Containing the Charges would be due on a specific date, and the Prosecution and Defence submissions would all be due on the same date, exactly one month later.¹⁶ Following the submissions, the Prosecution would have seven days (i.e., one week) to reply to the written submissions of the Defence teams¹⁷, while the Defence teams would then be afforded the same amount of time – seven days – to reply to the submissions of the Prosecutor.¹⁸

7. This schedule – and specifically the fact that the first set of Prosecution and Defence submissions would be due on the same date – has been the subject of vigorous Defence objections. Indeed, on 22 April 2014, the Arido Defence submitted its Request to Amend the 14 March 2014 Scheduling Order (ICC-01/05-01/13-255) and for Permission to File its Written Submissions in Lieu of Oral Hearing after those of the Prosecution¹⁹, in which the Arido Defence very rightly

¹⁶ ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, p.15, l. 7-12; ICC-01/05-01/13-255, p. 7-8; ICC-01/05-01/13-443, p. 5.

¹⁷ ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, p.15, l. 12-14; ICC-01/05-01/13-255, p. 7-8; ICC-01/05-01/13-443, p. 5.

¹⁸ ICC-01/05-01/13-T-1-ENG CT, 27 November 2013, p.15, l. 14-15; ICC-01/05-01/13-255, p. 7-8; ICC-01/05-01/13-443, p. 5.

¹⁹ ICC-01/05-01/13-351.

noted the guiding principle that the Defence is granted the right to have the last word.²⁰ Furthermore, it emphasized the “reactive” role of the Defence – and the corresponding unequivocal and full burden of proof on the Prosecution²¹ – as a result of which it requested “to be permitted to file its written submissions after those of the Prosecution” as being coherent with the purpose of the confirmation of charges, and in accordance with the practice of the Court.²² Indeed, as well-noted by the Arido Defence, “[r]equesting the Defence to submit its written submissions prior to knowing the Prosecution’s arguments amounts to asking the Defence to actively demonstrate that the evidence in the Prosecution’s list of evidence do not support the charges in the DCC, in other words, it outs the onus of rebuttal on the Defence.”²³

8. Finally, the Arido Defence proposed that the Prosecution file its written submissions on 30 June 2014, and that the Defence teams file their submissions on 21 July 2014, allowing, in this manner, the Defence teams to properly respond to the Prosecution’s submissions, in a streamlined and narrow manner. Specifically, it reasoned that “permitting the Arido Defence to file its submissions after those of the Prosecution will lead to more *specific and focused pleadings* (as the Defence will not have to speculate on the Prosecution’s narrative) which will assist the Pre-Trial Chamber in making its decision on the confirmation of the charges.”²⁴

9. The Arido filing was supported by the Mangenda Defence, which filed its ‘Réponse à la requête de la défense de Monsieur Narcisse ARIDO ICC-01/05-01/13-351 – 22-04-2014 concernant le calendrier de la procédure de confirmation

²⁰ ICC-01/05-01/13-351, para. 17.

²¹ ICC-01/05-01/13-351, para. 16.

²² ICC-01/05-01/13-351, para. 18.

²³ ICC-01/05-01/13-351, para. 21.

²⁴ ICC-01/05-01/13-351, para. 23.

ou non des charges’²⁵ on 23 April 2014, and indicated that “[l]’esprit essentiel du débat pénal est que l’accusé ne devrait pas être « surpris » et doit disposer « **du temps et des facilités nécessaires à la préparation de sa défense** ». Il serait donc contraire à ce principe universellement reconnu de demander à la défense d’un accusé de conclure sans disposer de l’argumentation complète du Procureur.”²⁶

10. On 25 April 2014, the Single Judge rendered his decision “Decision on the requests to amend the calendar for the confirmation of charges proceedings filed by the Defence of Narcisse Arido on 22 April 2014 and by the Defence of Jean-Jacques Mangenda on 23 April 2014”²⁷, in which he Single Judge indicated that he found unpersuasive “Mr Arido’s assertions revolving around the contention that without an amendment of the calendar for the confirmation proceedings the Defence would be requested to provide its submissions without knowing the arguments of the Prosecutor, thereby prejudicing the suspect’s rights under article 61(6) of the Statute;”²⁸ and that

CONSIDERING that the document containing the charges has precisely the function of formulating the charges that the Prosecutor has decided to bring against the suspect (charges which must identify with sufficient precision the facts underlying the alleged crime(s) and their legal characterization), and explains how the evidence submitted (as detailed in the list of evidence) relates to and support the charges proffered;

CONSIDERING therefore that, on the basis of the document containing the charges, which constitutes the document setting out the Prosecutor’s case in respect of the charges for which confirmation is sought, and in light of the Prosecutor’s list of evidence (both documents to be filed 30 days before the Defence written submissions), the Defence will be in a

²⁵ ICC-01/05-01/13-357.

²⁶ ICC-01/05-01/13-357, p. 3, para. 2.

²⁷ ICC-01/05-01/13-364.

²⁸ ICC-01/05-01/13-364, p. 4.

position to fully exercise its rights under article 61(6) of the Statute, namely to object to the charges (which are formulated and explained in the document containing the charges), challenge the Prosecutor's evidence (which is itemized in the Prosecutor's list of evidence and the relevance of which to the charges is elucidated in the document containing the charges) and present evidence (which must be detailed in the Defence list of evidence to be filed, in accordance with rule 121(6) of the Rules, before the parties' submissions for the purposes of the confirmation of charges, only on the basis of the document containing the charges and the list of evidence).²⁹

11. It should be noted that at no time during this entire pre-trial procedure – as well as during the three various confirmation calendars – did the Prosecution contest or object to the structure of the confirmation proceedings as formalized by the Single Judge. Specifically, the Prosecution has known of this structure – i.e., that the Defence and Prosecution submissions would be introduced on the same day – since 27 November 2013, more than eight months ago. It has had ample time to deduce that perhaps there might have been a chance that the Defence submissions would not mirror that of its own, and might – legally and factually speaking – deviate from its own prosecutorial strategy. That the Prosecution has failed to object to this structure in a timely manner cannot and should not today be allowed to prejudice the Defence yet further, by yet another change in the schedule. The Kilolo Defence cannot over-emphasize the vigorousness and strenuousness of its opposition to this untimely and extremely prejudicial request by the Prosecution, submitted no less than one day before its replies are due.

12. In any case, to avail itself of the possibility of extensions provided under Regulation 35 requires that (i) the Prosecution demonstrate *good cause*, and (ii) that the *participants – here, the Defence teams – be given an opportunity to be heard*. The Kilolo Defence team is flabbergasted as to how the Prosecution could

²⁹ ICC-01/05-01/13-364, p. 5.

possibly have comprehended that filing an extension request *one day before the Prosecution replies are due* could possibly afford the other participants in these proceedings the slightest modicum of ability to adequately respond. Rather, the Kilolo Defence has no choice but to believe **the Prosecution is acting in bad faith by submitting such Prosecution Extension Request with full knowledge that the Defence teams will not be afforded a proper opportunity to respond**. After all, if the Pre-Trial Chamber is expected to render a decision on Prosecution replies which are due in less than twenty-four hours, it stands to reason that either the Defence teams will not be given the opportunity to respond before such decision is taken, *or* the very act of submitting such Prosecution Extension Request would delay and postpone the deadlines for the Prosecution replies in the confirmation proceedings. The Defence notes that if the participants – i.e., the Defence teams – are not afforded the opportunity to respond, this would be a grave and manifest injustice in proceedings already littered with ambiguity and unfairness.

13. The Kilolo Defence also contests that “good cause” has been demonstrated by the Prosecution in its Extension Request. The Prosecution bases its request on the fact that “the Defence’s substantive confirmation submissions would average 170 pages per suspect”.³⁰ Furthermore, the Prosecution seems mystified by the fact that “the five defence teams raise *issues particular to their client*, which each require more than seven days to evaluate, analyse, and respond to.”³¹ That the Prosecution seems surprised by the fact that each Defence team might raise issues particular to its client is nothing less than shocking to the Kilolo Defence team; after all, the Prosecution is well aware that the Suspects are represented by distinct legal teams, and would have to respond to distinct legal charges. Indeed, the Prosecution’s Document Containing the Charges *itself* particularizes charges

³⁰ ICC-01/05-01/13-608, para. 4.

³¹ ICC-01/05-01/13-608, para. 4.

and modes of liability of each Suspect; did they think the Defence teams would do any less for their client?

14. The Prosecution also alleges that the “Defence submissions differ from the Prosecution’s confirmation submission both on the facts and on the applicable law.”³² Once more, this is hardly a revelation. The very structure of the confirmation proceedings – and has been previously contested by various Defence teams – has required that the initial Defence and Prosecution submissions be filed on the same day. Necessarily, as already previously noted, this has required that the Defence teams attempt to speculate and predict what the Prosecution would allege in its own submissions. The Kilolo Defence finds it hard to believe that the Prosecution did not contemplate similar divergences in factual and legal submissions, especially in light of the fact that these issues have already been brought to light by the Defence teams *and decided* by the Single Judge.

15. The Single Judge himself found no prejudice in the structure of the confirmation proceedings, holding that the parties would be able to fully exercise their guaranteed rights. To allow a last-minute, eleventh-hour postponement to the confirmation proceedings for the Prosecution – but not where the Defence teams have requested a similar modification to the calendar – would be a manifest injustice, skewed in favour of the Prosecution and the Prosecution alone.

16. The Defence teams have already suffered two extensions and three different confirmation calendars. Despite only being afforded seven days – the same amount of time given to the Prosecution – the Defence has chosen not to complain or request yet more prolongations, but to continue as has been settled

³² ICC-01/05-01/13-608, para. 5.

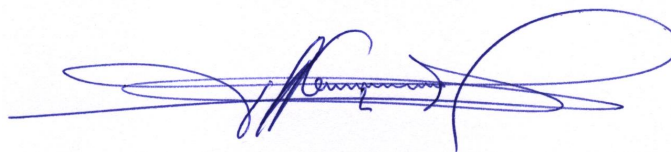
by the Single Judge. The Kilolo Defence ask that the Prosecution do the same and not prolong these proceedings any further.

17. Lastly, the Kilolo Defence wished to emphasize that every delay in the proceedings prejudices Mr Kilolo yet further, especially in light of the fact that Mr Kilolo has been denied interim release during the more than eight months he has been imprisoned. Every delay in the calendar is a grave prejudice to Mr Kilolo, and the Prosecution should be mindful of the fact that their failure to request extensions in a timely manner is absolutely unacceptable, especially where the liberty of the Suspects is at stake.

III. RELIEF REQUESTED

18. The Defence for Mr Kilolo respectfully requests that the Single Judge:

- Deny in its entirety the Prosecution's Request ICC-01/05-01/13-608 for variation of time limit for its confirmation response.



Ghislain M. Mabanga

Lead Counsel for Mr. Aimé Kilolo Musamba

Dated this 5 August 2014,

At The Hague, The Netherlands