

**Cour
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**International
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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

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

with

Public Annexes A, B and D and Confidential Annex C

**Public redacted version of "Prosecution's Observations on the Agenda of the First
Status Conference", 20 March 2015, ICC-01/05-01/13-859-Conf**

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of *the Regulations of the Court* to:

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) submits its observations pursuant to the order of Trial Chamber VII (“Chamber”) of 23 February 2015, in preparation for the first status conference.¹

II. Procedural history

2. On 11 November 2014, Pre-Trial Chamber II issued its decision on the confirmation of charges, committing Jean-Pierre Bemba Gombo (“Bemba”), Aimé Kilolo Musamba (“Kilolo”), Jean-Jacques Mangenda Kabongo (“Mangenda”), Fidèle Babala Wandu (“Babala”), and Narcisse Arido (“Arido”) to trial (“Confirmation Decision”).²

3. On 30 January 2015, the Presidency constituted the Chamber and transmitted to it the full record of the proceedings.³

4. On 23 February 2015, the Chamber invited the Parties to submit written observations on the Chamber’s provisional agenda.⁴

5. Pursuant to a joint Defence request,⁵ the Chamber extended the time limit for the Defence teams to file their observations on the Chamber’s provisional agenda to 13 April 2015.⁶

¹ ICC-01/05-01/13-824.

² ICC-01/05-01/13-749.

³ ICC-01/05-01/13-805.

⁴ ICC-01/05-01/13-824.

⁵ ICC-01/05-01/13-831.

⁶ Email from the Chamber on 10 March 2015 at 10h45.

III. Confidentiality

6. This filing is classified as “Confidential”, as it refers to material that is not available to the public. The Prosecution will file a public redacted version as soon as possible.

IV. Submissions

7. The Prosecution provides its observations on each item enumerated in the Chamber’s provisional agenda below.⁷ The Prosecution does not see the need at this stage to add any agenda item.⁸

A. Timing, volume and modalities of disclosure

i. Timing and volume of disclosure

8. To date, the Prosecution has disclosed to the Defence 3422 items of evidence. The disclosed evidence includes 45 potentially exonerating items pursuant to article 67(2) of the Rome Statute (“Statute”) and 1368 items disclosed pursuant to rule 77 of the Rules of Procedure and Evidence (“Rules”). Since the constitution of the Chamber, the Prosecution has disclosed 212 items of evidence. An additional 321 items were disclosed on 20 March 2015.

9. Furthermore, the Defence teams were provided access to all ICC Detention Centre calls and call records,⁹ [REDACTED] via TRIM.¹⁰

⁷ ICC-01/05-01/13-824, para.2.

⁸ ICC-01/05-01/13-824, page 3.

⁹ ICC-01/05-01/13-409.

¹⁰ ICC-01/05-01/13-451-Conf.

10. In terms of outstanding material, the Prosecution is in the process of reviewing around 750 items of evidence for the purpose of disclosure. They include open source material, material related to witnesses that were recently interviewed, and material obtained after the confirmation hearing from national authorities as a result of requests for assistance (“RFAs”). The Prosecution has identified around 40 items that require redactions for which it will seek the Chamber’s authorisation upon the adoption of a redaction protocol.

11. In addition, the transcripts and translations of approximately 800 (disclosed¹¹) ICC Detention Centre calls are outstanding. Approximately 350 transcripts and translations have been finalised and are currently being processed in the system. They will be disclosed within the next few weeks. In order to enable the disclosure of the remainder of the translations and transcriptions within the shortest time limits, the Prosecution’s transcription and translation services are operating at full capacity. They envisage completing all of the transcriptions and translations by mid-to-late-June, barring no unforeseen transcription or translation requirements in this or other cases that might impact on the projected time for completion. The Prosecution will disclose the material as soon as the available transcripts and translations are processed, on a rolling basis.

12. A number of issues affect the Prosecution’s ability to provide a realistic timeline for the completion of disclosure. The collection of crucial evidentiary material has been markedly delayed for reasons beyond the Prosecution’s control. This material, which is presently in the Registry’s custody, must be reviewed for privileged information before it can be provided to the Prosecution. The length of such a review process depends on the volume of the material and its complexity, neither of which is known to the Prosecution. The Prosecution is therefore unaware

¹¹ As noted, all the ICC Detention Centre Calls were disclosed in their original form to the Defence teams. See ICC-01/05-01/13-409.

of when it will have access to the material. For that reason, the Prosecution is not in a position to offer any indication as to when any necessary disclosure of the following material can be completed:

- Items seized from Mangenda upon his arrest on 23 November 2013: some of the seized items were transferred to the Registry on 13 May 2014.¹² Upon the unsealing of the material, electronic items were forensically acquired and documentary items were copied and certified.¹³ The material was subsequently provided to the Independent Counsel on 17 and 23 July 2014.¹⁴ [REDACTED].¹⁵ [REDACTED].¹⁶ To date, the Prosecution does not know the volume of the material, nor is it privy to the outcome of the vetting process already conducted by the Independent Counsel;
- [REDACTED].¹⁷ Similarly, the Prosecution does not know the volume of the material, nor is it aware of when it will have access to them, which is dependent on the procedure to be adopted for its unsealing, acquisition and vetting to screen out potentially privileged items.¹⁸
- Two sealed DVDs containing the contents of the email accounts of Kilolo, Babala, Arido and Mangenda: these DVDs were transmitted by the French authorities to the Prosecution on 21 March 2014. The Prosecution refrained from unsealing the DVDs and requested the Single Judge to appoint an Independent Counsel to vet the material to protect the integrity of any potentially privileged communications.¹⁹ On 25 April 2014, the Single Judge appointed an Independent Counsel to review the content of the email accounts extracted from the two DVDs in order to screen out privileged items or items

¹² The seized material was transmitted in 15 closed envelopes. See ICC-01/05-01/13-400; ICC-01/05-01/13-400-Anx.

¹³ ICC-01/05-01/13-587 ; ICC-01/05-01/13-587-Conf-Anx1.

¹⁴ ICC-01/05-01/13-587 ; ICC-01/05-01/13-587-Conf-Anx1.

¹⁵ [REDACTED]. See ICC-01/05-01/13-815-Conf-Exp. This filing was reclassified as confidential pursuant to the Chamber's instruction on 23 February 2015. See ICC-01/05-01/13-815-Conf.

¹⁶ ICC-01/05-01/13-815-Conf-Exp. This filing was reclassified as confidential pursuant to the Chamber's instruction on 23 February 2015. See ICC-01/05-01/13-815-Conf.

¹⁷ [REDACTED]. See ICC-01/05-01/13-850-Conf; ICC-01/05-01/13-850-Conf-Anx1.

¹⁸ [REDACTED]. See ICC-01/05-01/13-842-Conf.

¹⁹ ICC-01/05-01/13-310-Conf.

irrelevant to the confirmation proceedings.²⁰ The Registry extracted material from one DVD, while the extraction of the other was not possible due to a technical issue.²¹ [REDACTED],²² who submitted a report on 11 September 2014 identifying 16 emails from Kilolo's email account as relevant. Neither the report nor the emails have been provided to the Prosecution.²³ Nor is the Prosecution privy to the outcome of the Registry's efforts to obtain an undamaged copy of the second DVD, or the proposed timing of its acquisition and vetting before access to the Prosecution can be granted.

13. Finally, while investigations were largely complete by the time of the confirmation hearing,²⁴ the Prosecution continues with further focussed investigations,²⁵ including in relation to matters raised by the Defence in their confirmation submissions. The Prosecution will process and review the collected material for disclosure in a timely manner.

ii. Modalities of disclosure

14. The Prosecution suggests the continued implementation of the modalities of disclosure set out by the Pre-Trial Chamber.²⁶ As such, disclosure between the Parties should take place through the Registry and all evidence disclosed should be communicated to the chamber. In principle, E-Court should be the appropriate medium for disclosure. However, in respect of very specific and voluminous collections of material, the most efficient way to make the material available to the Parties may be by Registry providing direct access to the material *via* TRIM. This is

²⁰ ICC-01/05-01/13-366-Conf.

²¹ ICC-01/05-01/13-765, p.4.

²² ICC-01/05-01/13-490-Conf, para.6.

²³ The Prosecution sought re-classification of the report and awaits the Chamber's decision. See ICC-01/05-01/13-828-Conf.

²⁴ ICC-01/04-01/10-514, para.44.

²⁵ ICC-01/09-02/11-728, paras.118, 120.

²⁶ ICC-01/05-01/13-T-2-CONF-ENG, pp.31-33.

especially true in respect of material already in the Registry's possession, such as Court documents or seized material.²⁷ The Prosecution will make further requests in this respect if and when the issue arises.

B. Protocols to be adopted on specific issues

15. The Prosecution has separately submitted proposed protocols on (i) redactions;²⁸ (ii) the handling of confidential information and contacts with witnesses;²⁹ and (iii) witness preparation,³⁰ which the Prosecution incorporates by reference for the purpose of this filing.

16. In respect of witness familiarisation, the Prosecution does not oppose the adoption of the recently adjusted protocol submitted by the Victims and Witnesses Unit ("VWU") in the *Ntaganda*³¹ and *Gbagbo*³² cases³³ with the following exceptions:

- References to victims, legal representatives, and participants: all references to participating victims or their legal representatives have been removed, considering that there are none in the present case;
- Limitation of contact: the Prosecution suggests clarifying the language related to the limitation of contact between the witness and the calling party as follows: "From the time the witness arrives in the Netherlands or at the location of testimony where different from the seat of the Court, until the end of the witness' testimony, the calling party's contact with the witness is

²⁷ As noted, the Pre-Trial Chamber authorised this approach e.g. in respect of the ICC Detention Centre calls and call records, [REDACTED]. See ICC-01/05-01/13-409; ICC-01/05-01/13-451-Conf.

²⁸ ICC-01/05-01/13-825-AnxB.

²⁹ ICC-01/05-01/13-858-AnxB.

³⁰ ICC-01/05-01/13-856-AnxB.

³¹ ICC-01/04-02/06-451-Anx1.

³² ICC-02/11-01/11-791-Anx1.

³³ Which in turn are based on the familiarisation protocol adopted in the Kenya cases: ICC-01/09-01/11-704-Anx and ICC-01/09-02/11-727-Anx, and which were aligned with the applicable preparation protocols.

restricted to the preparation and courtesy meetings (see further) and the examination in Court, unless otherwise authorised by the Chamber.”³⁴

- Contact with counsel during testimony: the Prosecution suggests clarifying the language related to the contact between counsel and the witness as follows: “Counsel of witnesses falling under the scope of rule 74 (see further) are entitled to speak to their clients during the whole duration of the witnesses’ stay at the location of testimony but only in relation to rule 74 matters.”³⁵
- Location of the meetings with witnesses: the Prosecution suggests clarifying the language related to the location of the meetings with witnesses as follows: “All preparation and courtesy meetings with witnesses, excluding expert witnesses, and the entity calling the witness will be conducted within the premises of the VWU, unless otherwise authorised by the Chamber.”³⁶

17. For ease of reference, the proposed amendments are attached to this filing in track-changes at Annex A. A clean version thereof is attached at Annex B.

18. Finally, the Prosecution has no objection to the adoption of the protocol on vulnerable witnesses suggested by the Chamber.³⁷

C. Estimated number of (i) witnesses and any known protection issues, including possible referrals to the Court's witness protection program, and (ii) documentary and other non-testimonial evidence to be relied upon at trial

i. Estimated number of witnesses

³⁴ Annexes A and B, para.29.

³⁵ Annexes A and B, para.32.

³⁶ Annexes A and B, para.35.

³⁷ ICC-01/05-01/08-974-Anx2.

19. Depending on their availability, the Prosecution intends to call approximately [REDACTED]. This assessment is based on the present circumstances, which may change depending on the developments in the case and/or the situation of the witnesses. [REDACTED].

ii. Estimated number of documentary and other non-testimonial evidence

20. The Prosecution intends to seek the admission of certain evidence *in limine* from the bar table, mainly comprising the following categories: call data records; financial records; intercepted communications; ICC Detention Centre calls; and related material. The Prosecution is currently preparing its first request for the admission from the bar table of approximately 400 items of evidence and will submit further requests in due course.

D. Admissions and/or agreements as to evidence

21. On 20 February 2015, the Prosecution provided the Defence teams with a list of 64 basic stipulations or facts to which it sought their response by 6 March 2015.³⁸ On 28 February 2015, the Arido Defence informed the Prosecution that - pending the resolution of its motion for the withdrawal of charges³⁹ - it will not be in a position to provide its views and will file written submissions explaining its opposition to agreed facts. On 6 and 9 March 2015, the Defence teams of Bemba, Kilolo, Mangenda and Babala informed the Prosecution that they could not agree that the proposed facts were not contested, for a variety of reasons.

³⁸ See Annex C containing the Prosecution's first proposal of agreed facts.

³⁹ See ICC-01/05-01/13-812; ICC-01/05-01/13-827-Conf-Corr.

E. Languages to be used in the proceedings

22. The Prosecution witnesses currently envisaged may testify in [REDACTED].

F. Conduct of the proceedings

23. The Prosecution proposes the adoption of a protocol on the “conduct of the proceedings” annexed as Annex D to this filing. The proposed protocol builds on decisions issued by different Trial Chambers,⁴⁰ and incorporates practices followed by other international tribunals. Adopting the protocol will clarify expectations in respect of the conduct of proceedings and promote uniformity in the Court’s practice.

G. Commencement date of the trial

24. As noted in paragraph 12, to date, for various reasons beyond its control, the Prosecution is awaiting the receipt of a significant body of material, including material stored on electronic devices, likely to yield important evidence in the case. The Prosecution does not know the volume of the outstanding material, nor when it will be given access thereto. While the capacities of the seized electronic devices are finite, how much data they actually hold is anyone’s guess.⁴¹

25. Upon receipt, the Prosecution will need to process and analyse the material, which in turn may result in the need to re-direct its investigations accordingly. Depending on the languages used, the material may necessitate going through the lengthy process of transcriptions and translations. Until the Prosecution obtains more clarity on any of these factors, it is not in a position to offer a date for the commencement of the trial.

⁴⁰ See for example ICC-01/09-01/11-847-Corr; ICC-01/09-02/11-867; and ICC-01/05-01/08-1023.

⁴¹ ICC-01/05-01/13-234-Conf, para.21.

V. Conclusion

26. The Prosecution respectfully submits these observations in preparation for the first status conference before the Chamber.



Fatou Bensouda, Prosecutor

Dated this 24th Day of March 2015
At The Hague, The Netherlands