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No: ICC-01/05-01/13

Date: 6 August 2015

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, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
AND NARCISSE ARIDO***

Public

**Urgent Joint Defence Request for Variation of the Deadline for the Defence
Response to the Prosecution's Second Request for the Admission of Evidence from
the Bar Table**

Source: Defence for Jean-Pierre Bemba Gombo
Defence for Aimé Kilolo Musamba
Defence for Jean-Jacques Kabongo Mangenda
Defence for Fidèle Babala Wandu
Defence for Narcisse Arido

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

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**Unrepresented Applicants
(Participation/Reparation)**

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**The Office of Public Counsel for the
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Introduction

1. Pursuant to Regulation 35(1) of the Regulations of the Court, the Defence teams for Mssrs. Arido, Babala, Bemba, Kilolo and Mangenda (collectively, 'the Defence') respectfully request that the commencement of the time-period for responding to the 'Prosecution's Second Request for the Admission of Evidence from the Bar Table' (hereinafter the 'Second Bar Table Motion'),¹ be suspended until: (i) after the conclusion of the Prosecution case or (ii), in the alternative, until at least the date on which the Trial Chamber renders its decision on the Prosecution's First Bar Table Motion, and to extend the period for making any response by an additional three weeks.

2. There is good cause to suspend the deadline until after the conclusion of the Prosecution case due to:
 - i. The sheer quantity of items, which are the subject of the Second Bar Table Motion;
 - ii. The presumption – as set out in Article 64(8) of the Statute – that evidence should be submitted after the commencement of the trial;
 - iii. The prejudicial impact of requiring the Defence to advance their case theory concerning key elements of the charges, before the defendants have entered their pleas, and before related witness testimony has been heard; and
 - iv. The impact that litigating these issues would have on the commencement of the trial, and the time available for Defence pre-trial preparation.

3. As an interim measure, the Defence further requests that the deadline be suspended pending the Trial Chamber's determination of the present request.

¹ ICC-01/05-01/13-1113-Conf.

4. The trial is due to start in less than two months. For the last month, the time and resources of the Defence have been diverted by constant filings,² the delayed disclosure of Prosecution evidence (such as the expert reports, and the voluminous statements of P-261), and Prosecution requests for the admission of additional evidence.
5. It is therefore crucial that the Defence can focus its time and energy on preparing for the trial, rather than labouring in vain on a response, which might be rendered moot by the Trial Chamber's decision on this request.
6. Finally, in all scenarios, the Defence requests that the deadline run from the receipt of the French translation of the Second Bar Table Motion.

Submissions

- (i) *Request to suspend deadline until after the conclusion of the Prosecution case*

7. The Second Bar Table Motion concerns 579 items of evidence, which is 25% of the Prosecution's list of evidence.
8. If the Defence were to litigate the relevance and probative value of such a significant component of the Prosecution's case now, it would mean that the trial would, in effect, be partially concluded before it has begun.
9. This is both illogical and contrary to the legal framework established by the Rome Statute.
10. Article 64(8) of the Statute provides that:

² There have been sixty filings since the Prosecution filed its list of witnesses and evidence on 30 June 2015.

- (a) At the commencement of the trial, the Trial Chamber have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.
- (b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

11. Article 64(8)(a) and (b) thus delineates a clear sequence of events: the charges should be read, the Trial Chamber should satisfy itself that the defendants understand the charges, the defendants should then enter a plea, the trial then commences, the Presiding Judge may give directions on the conduct of the proceedings, and then and only then, the parties may submit evidence.

12. The logic underpinning this provision appears to be that the defendant should be given sufficient time to review the charges in light of the totality of disclosed Prosecution evidence, before being called upon to enter his or her plea. If the defendants can reserve their decision as to whether to plead guilty or not guilty until the first day of trial, it also follows that they should be entitled to reserve their position as to what line of defence they will advance in relation to individual items of Prosecution evidence until this point.

13. Given this context, it would be both premature and unfair to require the Defence to advance evidential submissions in relation to 25% of the Prosecution case, before the individual defendants have entered their respective pleas, and confirmed that they understand the charges to which the Second Bar Table Motion relates.

14. The inherent prejudice of such a result is aggravated by the fact that the Second Bar Table Motion includes a conversation between Mr. Bemba and Mr. Mangenda, which was never vetted for privilege or confidential, internal Defence work product.

15. The Defence have an obvious interest in requesting the exclusion of conversations, which include privileged information. The question as to whether information is privileged nonetheless turns on whether the communications were “effected in furtherance of crime or fraud”.³ In order to address this question, the Defence would need to:

Firstly, advance their position as to whether the communication was effected in furtherance of a crime or fraud; and

Secondly, if this is denied, put forward the Defence case as to why the communication was not effected in furtherance of a crime or fraud.

16. It is impossible to address these points without entering a *de facto* plea in relation to whether the participants in the communication in question acknowledge that they engaged in a crime or fraud, and without advancing the Defence case theory concerning the crime or fraud in question. It is one thing to do so on a strictly *ex parte* basis before the Trial Chamber. Doing so on an *inter partes* basis, however, puts the cart before the horse as concerns the proper order of an adversarial trial, and further subverts the procedural guarantees set out in Article 64(8) of the Statute.

17. Requiring the Defence to raise substantive evidential arguments at this juncture would also undermine the Trial Chamber’s ruling that the trial should not commence until three months after the completion of Prosecution disclosure.⁴

³ ICC-01/05-011 I3-947, para. 14.

⁴ ICC-01/05-01/13-960, para. 11.

18. Although not framed explicitly as such, the Second Bar Table Motion implicitly requires the Trial Chamber to reconsider and reverse previous deadlines established by the Trial Chamber: evidential submissions would commence earlier than 29 September 2015, and the time allocated for post-disclosure, pre-trial Defence preparation would be significantly shortened.
19. The Defence response to the Second Bar Table Motion is currently due on 24 August 2015. If this deadline is adhered to, the Defence would be required to put forward its position on 25% of the Prosecution case, more than 36 days prior to the commencement of the trial, and only 21 days after the filing of Prosecution's last witness statement (P-261).
20. The purpose of stipulating that the trial should not commence until three months after the completion of Prosecution disclosure was to provide the Defence with adequate time and facilities to finalise its review of Prosecution evidence, and to prepare its case theory before the trial commences. This objective would be frustrated if evidential issues – which are intrinsically tied to the adversarial trial process – are litigated before the expiration of the three month period.
21. Rather than using this limited period to develop an oversight of the Prosecution case as a whole, the Defence would be forced to address individual aspects on a piecemeal basis, without the benefit of linked witness testimonies, and without having had sufficient time to complete its investigations concerning the content and context of these items.
22. The result would not only be deleterious to the right of the Defence to adequate time and facilities to prepare its case in advance of the trial, it would also be contrary to judicial economy and efficiency, as the Chamber would

not have at its disposal information that could be of key importance to its decision.

23. Although the Defence could, in accordance with Rule 64(1), raise issues that were not known to it at the time that the evidence was submitted, this would result in a 'multiplication of procedure',⁵ triggered by the need to reopen and reconsider decisions, which were litigated prematurely.

(ii) *Request to Toll Commencement of Period to Respond Until After the Trial Chamber Decides the First Bar Table Motion*

24. The Trial Chamber is already seized of a voluminous Prosecution motion for the admission of documents from the bar table.⁶ Many of the arguments now being adjudicated by the Trial Chamber are relevant to disposition of the Second Bar Table Motion. The Trial Chamber's determinations in respect of those arguments are also of vital significance to the position that would be adopted by the Defence in relation to the Second Bar Table Motion.

25. The Defence also requests, given the volume of material tendered, an enlargement of the default three-week time-period accorded under the Regulations for filing responses. Such extensions are customarily granted at the ICTY in respect of large bar table motions such as the Second Bar Table Motion.⁷

iii) *Request that the deadline runs from the receipt of the French translation*

⁵ ICC-01/05-01/13-T-8-ENG, p. 5, lines 4-6.

⁶ [ICC-01/05-01/13-1013-Red](#).

⁷ See e.g. *Karadzic*, IT-95-5/18-T, Decision on the Prosecution's First Bar Table Motion, 13 April 2010, paras. 1-3 (reciting that the Trial Chamber granted the accused 53 days to respond to the Prosecution's omnibus bar table motion seeking the introduction of 321 items).

26. Pursuant to Article 67(1)(a), the defendants have the right to be informed of the nature, cause, and content of the charges in a language which the accused fully understands and speaks.
27. The Second Bar Table Motion encompasses a significant swathe of Prosecution evidence, and includes important analysis regarding attribution, and the relevance of such evidence to the charges.
28. Given that the items have been attributed to some of the accused, it is crucial that the defendants are provided with an effective opportunity to comment on the Second Bar Table Motion, and provide informed instructions to their Defence. This can only occur after they have been accorded an opportunity to review the Second Bar Table Motion in a language which they fully understand (which is French).
29. The Second Bar Table Motion is currently in the process of being translated by the Registry. The prejudicial impact of denying this aspect of the Defence request thus outweighs any minimal delay that might be occasioned, if the request is granted.

Relief Sought

30. For the reasons set out above, the Defence requests the Trial Chamber to:
- i. Suspend the deadline for the Defence response to the Second Bar Table Motion until after the conclusion of the Prosecution case;
 - ii. In the alternative, suspend the running of the deadline for the Defence response until after the Trial Chamber has issued its decision on the First Bar Table Motion, and enlarge the period

for responding by a further three weeks, so that the total time allocated is 42 days;

- iii. As an interim measure, immediately suspend the deadline for the Defence response pending the Trial Chamber's decision on this request; and
- iv. In all scenarios, suspend the deadline for the response until after the Defence has received the French translation of the Second Bar Table Motion.



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Chief Charles A. Taku
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Dated this 6th day of August 2015
At The Hague, The Netherlands